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DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

VOLUME XXXIII

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE FIRST
DISTRICT IN APRIL, MAY, JUNE, JULY, SEPTEMBER,
OCTOBER AND DECEMBER, 1889.

REPORTED BY
EDWIN BURRITT SMITH
OF THE CHICAGO BAR

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THOMAS A. MORAN, <i>Judge</i> ,	Chicago.
JOSEPH E. GARY, <i>Judge</i> ,	Chicago.
JOHN J. HEALY, <i>Clerk</i> ,	Chicago.

SECOND DISTRICT.

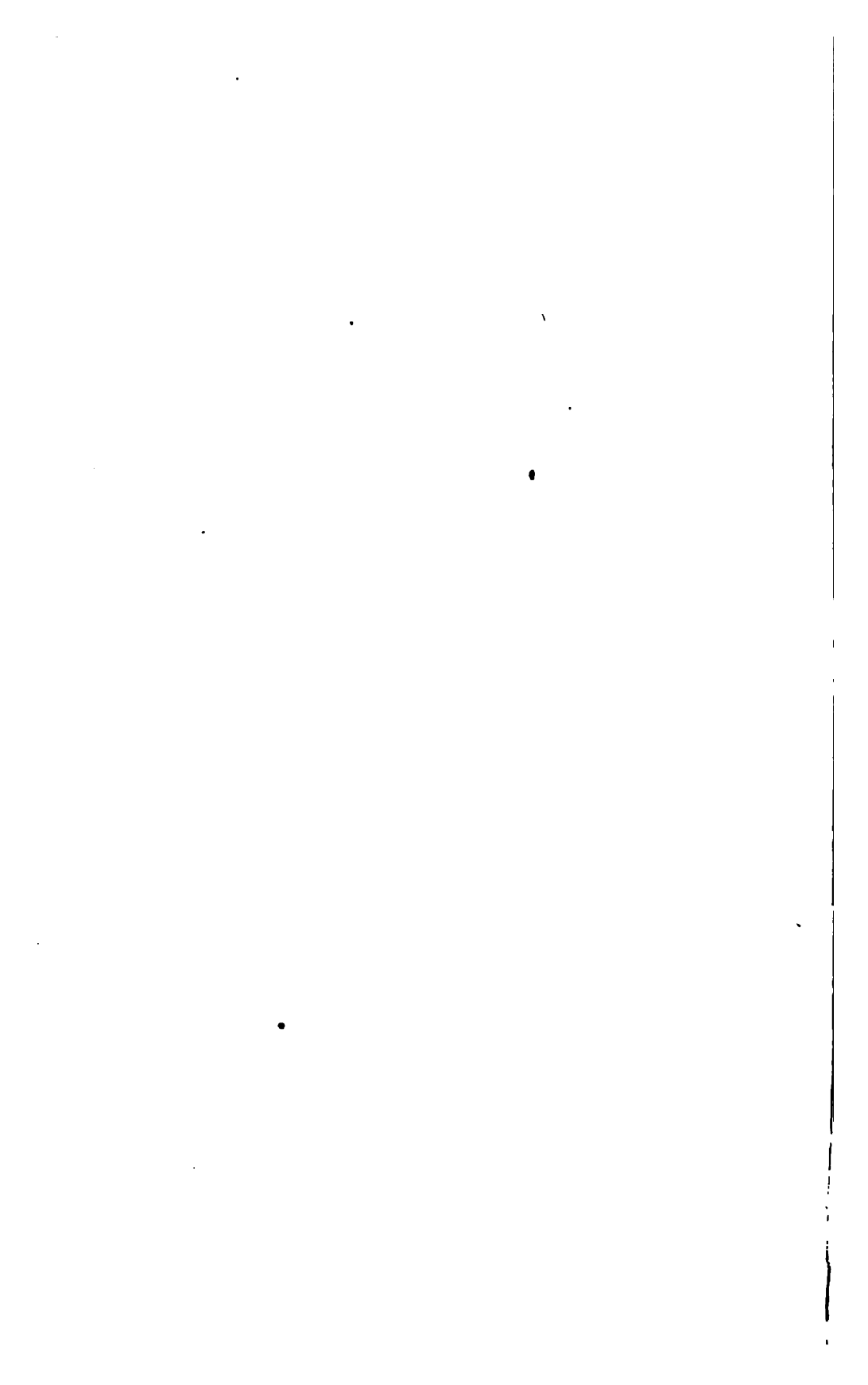
LYMAN LACEY, <i>Presiding Judge</i> ,	Havana.
C. B. SMITH, <i>Judge</i> ,	Champaign.
CLARK W. UPTON, <i>Judge</i> ,	Waukegan.
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GEORGE W. PLEASANTS, <i>Judge</i> ,	Rock Island.
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FOURTH DISTRICT.

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OWEN T. REEVES, <i>Judge</i> ,	Bloomington.
J. J. PHILLIPS, <i>Judge</i> ,	Hillsboro.
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CASES

IN THE

APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1888.

CHICAGO & GRAND TRUNK RAILWAY COMPANY

V.

CORNELIUS T. CROLIE.

Practice — Insufficient Abstract — Railroads — Negligence — Injury to Horse during Transit.

This court declines to consider an action to recover from a railroad company for injury to a horse during transit, for the reason that the abstract does not contain the substance of those parts of the record upon which error is assigned as required by rule twenty-one.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County ; the Hon.
A. N. WATERMAN, Judge, presiding.

Mr. F. H. CULVER, for appellant.

Mr. WILLIAM NUNN, for appellee.

GARNETT, P. J. The abstract of record filed in this case does not satisfy the 21st rule of court. It is nothing more than an index, and fails to show anything upon which error

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may be assigned. The supplemental abstract filed by appellee does give what purports to be an abridgment of the evidence of some of appellee's witnesses, but wholly fails to remove the objection we make, as we should still be obliged to examine the record itself on all the questions argued.

Appellant's grounds for its motion to suppress depositions are not given in the abstracts. The bill of exceptions shows 133 pages of testimony, while only three and one-half pages of the abstract are employed in setting forth what the witnesses said. About all we can ascertain of the evidence from appellant's abstract is, that Crolie shipped a mare over appellant's road; that she was injured and died from the injury; that appellant and appellee disagreed as to the question of negligence of appellant, and that the witnesses disagreed as to the quality and value of the animal. The abstract then states that instructions were given for plaintiff, others were given for defendant, and others asked for defendant, but refused. What the instructions were that were given or refused, or whether any exceptions were taken to those given or to the refusal of others asked by appellant is not stated. If we must accept such an abstract, the rule of court referred to is not of any benefit and might as well be repealed. The intention of the rule is to require a presentation in the abstract, in substance, of those parts of the record upon which error is assigned. Any material departure from this regulation is fatal to appellant's right to a hearing on the merits in this court. *Johnson v. Bantock*, 38 Ill. 111; *Major v. Collins*, October Term, 1888, of this court; *The People v. Angerer*, 23 Ill. App. 450.

The judgment is affirmed for want of compliance with the rule.

Judgment affirmed.

Poppers v. Meager.

GEORGE S. POPPERS

v.

MARY J. MEAGER.

Landlord and Tenant—Recovery of Rent—Judgment by Confession—Warrant of Attorney—Issuance of Execution before Completion of Record of Judgment.

38	19
51	231

Upon motion to set aside judgment by confession for rent due and unpaid, it is *held*: That the warrant of attorney was not defective for failing to name any particular attorney; that the claims for unliquidated damages urged as a set-off, should not be considered, not being in any wise connected with the demand for rent; and that the fact that the judgment was entered by the clerk in term time, would justify the issuance of an execution before the record of the judgment was complete.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. R. W. CLIFFORD, Judge, presiding.

Mr. THOMAS SHIRLEY, for appellant.

Mr. L. H. BOUTELL, for appellee.

GARY, J. No more shall the genial smile of the counsel for the appellant beam upon the bench or bar of Chicago. Tom Shirley is dead. His forty years of service in the courts of Cook county are ended in the grave.

June 25, 1888, the appellee filed in the Circuit Court the proper papers for a judgment by confession for rent due to her from the appellant, upon a lease from her to him, pursuant to a warrant of attorney contained in the lease. He made a motion to set aside the judgment, which was denied June 27, 1888. First, it is objected that the warrant is to confess not only a judgment for rent, but also upon a complaint in forcible detainer, and only a part of the power is executed. No argument or authority to support this objec-

tion is made or cited, and the validity of it is not self-evident. The practice of thus entering judgments for the rent is common, and has never been questioned. Second, that the power is to any attorney, and to no one by name, is answered by the cases *Hall v. Jones*, 32 Ill. 38, and *Keith v. Kellogg*, 97 Ill. 147. Third, the claims for unliquidated damages, which are urged as a set-off, are not connected with the demand for rent. *Hawks v. Lauds*, 3 Gilm. 227; *DeForrest v. Oder*, 42 Ill. 500; *Robison v. Hibbs*, 48 Ill. 408; *Hubbard v. Rogers*, 64 Ill. 434; *Evans v. Hughey*, 76 Ill. 115. The last and what at first blush might seem a serious objection, is that when execution issued upon the judgment and was levied, and even when the motion was denied, the judgment had not been written up upon the records of the court. On a judgment by confession entered by the clerk in vacation, execution may not issue before the record of the judgment is complete. *Ling v. King*, 91 Ill. 571; but in term time it may; *Weigley v. Matson*, 125 Ill. 64; Sec. 14, Act in relation to clerks, March 25, 1874; *Schirmer v. People*, 33 Ill. 276.

This appeal does not bring before this court the judgment itself, but only the order denying the motion to vacate it. *Lake v. Cook*, 15 Ill. 353; *Frear v. Comm. N. Bk.*, 73 Ill. 473; *Hall v. Hamilton*, 74 Ill. 437. That motion was rightly decided.

Judgment affirmed.

GEORGE S. POPPERS

v.

MARY J. MEAGER.

33	20
53	673
33	20
70	824
33	20
91	576

Landlord and Tenant—Distress for Rent—Act of May 1, 1873, Sec. 20—Secs. 42 and 53, Starr & C. Ill. Stat.—Costs—Secs. 25 and 26, Act of 1874—Agency—Ratification.

1. Upon a contention as to whether a landlord, in a proceeding on a distress warrant wherein the property seized had been released on a forthcoming bond, was entitled to recover the expense of the custody of the goods

Poppers v. Meager.

levied upon before they were so released, this court holds that the same method of defraying expenses of this character should be pursued in cases of distress, as in attachment; that the jury are not authorized to tax such costs, but that such allowances should be ascertained by the court; and that no injury has been done the defendant by reason of the finding of the jury upon this point, the same having been accepted by the court as reasonable and proper.

2. Without a judgment in his favor the plaintiff is not entitled to costs; if a cause of action is extinguished *pendente lite*, a right to a recovery, and with it the title to costs, is gone.

3. Proof of agency is not necessary in case of the bringing of suit by an alleged agent in behalf of his principal, when the latter adopts such act by prosecuting the same.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. THOMAS SHIRLEY, for appellant.

Mr. L. H. BOUTELL, for appellee.

GARY, J. April 6, 1887, there was filed in the Superior Court a distress warrant, purporting to be by the appellee against the appellant, by Baird & Bradley, agents. Goods of the appellant had been levied upon, under this warrant, May 3, 1887, the appellant pleading *nil debet*, and the case was afterward tried on that issue by a jury. In the meantime the rent, for which the warrant issued, had been paid, in compliance with a decree of the Circuit Court in a chancery suit, by the appellant against the appellee, to enforce the specific performance of an agreement for a renewal, for a further term, of the lease under which the rent distrained for had accrued.

On the trial a witness was permitted to state, against the exception of the appellant, that Baird & Bradley were the agents of the appellee, although, as the witness said, the appointment was in writing. No proof of the agency was necessary. The only issue for the jury to try was as to the indebtedness,

and the prosecution of the suit by the appellee was such an adoption of the act of the supposed agents as would have made any proof of the agency superfluous, if any question could have been made about it. *Connett v. Chicago*, 114 Ill. 232.

The expense of the custody of the goods levied upon, before they were released by a bond, was proved on the trial to have been \$15, and for that sum the jury rendered a verdict in favor of the appellee, and the judgment from which this appeal is taken was entered upon that verdict. This allowance of expenses is assigned as error. Under Sec. 20 of the act of May 1, 1873, relating to landlord and tenant, the proceedings upon distress warrants are to be "in the same manner as in case of attachment." Under the statutes now in force as to fees, "constables shall be allowed reasonable charges to be fixed by the justice, for removing and taking care of property levied upon by them" and "for taking possession of or removing property levied on, the sheriff shall be allowed to tax the necessary actual costs of such possessions or removal." Secs. 42 and 53, Chap. 53, Starr & C. Ill. Stats.

In proceedings by attachment such expenses are part of the costs (*Olds v. Loomis*, 10 Ill. App. 498), and in cases of distress, the same duties which devolve upon sheriffs and constables in attachment in levying upon and taking care of the property, are to be performed by the bailiff executing the warrant. The fair construction of the statute is that the same method of defraying expenses shall be pursued in cases of distress as in attachment. The jury, therefore, had nothing to do with the question, as the taxation of ordinary costs is the function, primarily, of the clerk. Sec. 25, Act 1874, Costs subject to retaxation by the court, Sec. 26. But the amount of allowances of this character is to be ascertained by the court. *Olds v. Loomis*, 10 Ill. App. 498.

The appellant is not injured by mode adopted, as the court, in a proper case, must have allowed the expenses which it has, by adopting the verdict, found to be proper charges. But such allowances being costs, the party is not entitled to recover them, unless he is, by statute, entitled to costs. "No final

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costs were recoverable by the plaintiff or defendant at common law." 2 Tidd's Pr. 945.

Without a judgment in his favor, for the thing sued for, debt, damages, chattels or land, the various statutes do not provide for any final costs to the plaintiff. If his cause of action is extinguished *pendente lite*, his right to a recovery, and with it his title to the costs, is gone. Sweetland v. Tuthill, 54 Ill. 215.

The judgment must be reversed, but as no further proceedings can be had in the cause, it is useless to remand it.

Judgment reversed.

CITY OF CHICAGO

v.

JOHN P. ALTGELD.

33	23
58	55

Municipal Corporations—Grading of Street—Injury to Private Property—Corporation Counsel—City Attorney—Conflict of Authority—Rule of Court.

1. The rule requiring exceptions to be taken to the rulings of trial courts in order to present them for review in this court, is as strictly applicable to municipal corporations as to natural persons, and it is likewise applicable in cases where the liberty of the citizen is involved.

2. In an action brought against a municipality for the recovery of damages for an injury to private property, occasioned through raising the grade of one of its streets, the burden of proof is upon the plaintiff to show that the injurious act was committed while he was owner of the premises injured.

3. In the case presented, this court holds that the conduct of the plaintiff with reference to the institution of suit, and the trial thereof, was open, fair and honorable in every respect.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. A. N. WATERMAN, Judge, presiding.

Messrs. JOHN W. GREEN and CLARENCE A. KNIGHT, for appellant.

Mr. EUGENE E. PRUSSING, for appellee.

GARNETT, P. J. Appellee sued appellant in an action on the case to recover damages to his property caused by raising the grade of the street on which it fronted.

About the time the suit was brought, the city attorney agreed to have the case tried speedily, and out of its order. A misunderstanding then arose between the city attorney and the corporation counsel, the latter insisting that the case should not be tried under the stipulation. When the case was called for trial on June 18, 1888, the time agreed on, the corporation counsel appeared in court, claimed the legal right to conduct the defense, and moved for a continuance or postponement for a reasonable time to prepare the defense. The motion was overruled, the trial proceeded and judgment was rendered for appellee for \$26,494.60, from which the city brings this appeal.

The Circuit Court is said to have erred in refusing to permit the corporation counsel, instead of the city attorney, to control the litigation, in disregarding his motion for a continuance or reasonable time to prepare the defense. The correctness of the ruling is not presented by this record, as no exception was taken thereto, and we should exceed the bounds of propriety in entering upon a discussion of the relations of the two city law officers to each other, or to the corporation. The rule requiring exceptions to be taken to the rulings of the trial courts, in order to present them for review in this court, is as strictly applicable to municipal corporations as to natural persons. So rigid is the rule that it is applied even in cases where the liberty of the citizen is involved. *Hughes v. The People*, 116 Ill. 330. The record shows that appellee acquired title to the property in question on September 26, 1887, but there was no evidence tending to prove that the raising of the grade which caused the injury was done, in whole or in part, after the title was vested in appellee. The only evidence as to the time when the grade was raised was given by the witness, Wain, and he only testified that the work was done within a year, and neither the court nor the

Hodges v. Percival.

jury would be warranted in inferring that it was done after September 26, 1887. His evidence was given June 18, 1888. The work might have been done between June 18, 1887, and September 26, 1887, and if it was, appellee would have no right of action. For such injuries, only the owner of the land at the time of the act so complained of, can recover damages. C. & A. R. R. Co. v. Maher, 91 Ill. 312; C. & E. I. R. R. Co. v. Loeb, 118 Ill. 203. The burden is on the plaintiff to show that the injurious act was committed while he was owner of the premises.

Considerable feeling having been manifested in the case, and the counsel for the city on the oral argument having expressed the hope that decision might be made which would not reflect on the appellee, and as, under such circumstances our silence on the subject may be misconstrued, we think it but right to say that, from the facts disclosed by the record, it appears that the course pursued by the appellee was fair, open and free from any just grounds for censure. For want of evidence on the point noted the judgment is reversed and the cause remanded.

Reversed and remanded.

LEONARD HODGES

v.

ELDORA PERCIVAL.

Master and Servant—Incompetent Servant—Unsafe Elevator—Injury to Third Person—Action for Damages.

In an action against the owner of a building for damages for a personal injury alleged to have been occasioned by the employment of an incompetent servant and the use of an unsafe elevator, this court declines to interfere with a verdict for the plaintiff.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

MESSRS. STILES & LEWIS and SHUMAN & DEFREES, for appellant.

MESSRS. BRANDT & HOFFMAN and JOSEPH N. BARKER, for appellee.

Per Curiam. This is an appeal from a judgment of \$1,500, in favor of appellee and against appellant, for the injury received by the falling of an elevator in appellant's building.

The questions are almost identical with those made in the case of *Hodges v. Bearse*, decided at the October term of this court and now pending in the Supreme Court, the appellee in that case and appellee in this having been both injured by the same accident. It would be entirely useless for us to state the case and the questions made. We have examined the record and find that the evidence clearly supports the verdict, and there is, in our opinion, no error of law. The judgment will therefore be affirmed.

Judgment affirmed.

GARY, J., takes no part in this case in this court.

33	28
44	568
33	28
50	406
51	77
33	28
33	134

J. OBERMANN BREWING COMPANY

v.

CAROLINE OHLERKING.

Landlord and Tenant—Rent—Guaranty of Payment—Notice of Lessee's Default—Attorney's Fees—Interest—Costs.

1. The entering into a written guaranty, upon a lease for the payment of the rent provided for therein, amounts to an admission of the due execution thereof.

2. The liability of a guarantor is in no wise affected by the failure of the lessor to give notice of the lessee's default.

3. While it is erroneous in such action to allow the recovery of attorney's fees and costs in entering judgment against the lessees, no complaint can be made thereof, where the record shows that no objection was made or exception taken, when the evidence touching the same was introduced, and that the attention of the court was in no manner called to the excessive verdict when a motion for a new trial was overruled.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. R. W. CLIFFORD, Judge, presiding.

Mr. B. M. SHAFFNER, for appellant.

Mr. WILLIAM NUNN, for appellee.

MORAN, J. This action was brought by appellee against appellant on a guaranty indorsed on a lease in the following terms: "For value received we hereby guarantee the payment of the rent and the performance of the covenants by the party of the second part in the within lease covenanted and agreed, in manner and form as in said lease provided." The proof showed that rent, to the amount of \$525, was due, and that attorney's fees to the amount of \$25, and \$6 costs were paid by plaintiff in attempting to enforce the covenants of the lease against the lessee, and there was a verdict and judgment for \$556.

On this appeal it is urged for reversal, first, that the court erred in admitting the lease in evidence without proof of its execution. To this objection there are two answers: 1. The evidence in the record shows that the execution of the lease was duly proved. 2. Appellant, having executed the guaranty on the back of the lease, was estopped to deny that the lease was duly executed by the lessees, whose covenants it has guaranteed shall be performed. Entering into the guaranty was an admission of the due execution of the lease, and the guarantor is not permitted to aver against such admission or to controvert it by proof. *Otto v. Jackson*, 35 Ill. 349.

Second. It is said that plaintiff had no right to recover, as there was no proof that appellant had notice of the default of the lessees in the payment of the rent. There is nothing in the objection. It was the duty of the grantor to see that the rent was paid by the lessees. The liability on the guaranty is primary, and no notice was necessary. *Voltz v. Harris*, 40 Ill. 155.

Third. It is urged that it was error to allow the recovery of attorney's fees and costs in entering judgment against lessees. It is true that attorney's fees and costs were not recoverable against appellant, but it was liable for interest on the installments of rent as they became due, and the judgment is only about \$5 more than it would have been if the fees and costs had been excluded and interest allowed. We can not reverse the judgment for this error, because the record shows that no objection was made or exception taken when the evidence as to the attorney's fees and costs were introduced, and that the attention of the court was in no manner called to the excessive verdict when the motion for new trial was overruled. To avail of such an error the party must, by general or specific objection, make it a ground for granting a new trial, and when that is not done the defendant will be regarded as having waived the objection. *Jones v. Jones*, 71 Ill. 562; *Leyenberger v. Paul*, 25 Ill. App. 480.

There is no error which authorizes interference by this court with the verdict, and the judgment of the Circuit Court must therefore be affirmed.

Judgment affirmed.

Nos. 62, 63, 64 and 65 at the present term between the same parties are affirmed, for the reasons stated in the foregoing opinion.

CITY OF CHICAGO

v.

LILLIAN E. SMYTHE.

Municipal Corporations—Streets—Condemnation of Private Property—Assessments—Interest.

In an action to recover from a municipal corporation the value of land appropriated by it for street purposes, it appearing that possession thereof was taken by the city six months before the institution of proceedings to condemn the same, the ordinance which authorized such condemnation providing that the cost of the proposed improvement should be paid for by

City of Chicago v. Smythe.

special assessment upon property benefited to the amount the same could be legally assessed, the balance to be paid by general taxation, this court holds that, although the city has been unable to collect the special assessment levied, the deficiency must be made up from the general fund, and that interest is recoverable upon the value of the land from the time the city took possession thereof.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. JOHN W. GREEN and CLARENCE A. KNIGHT, for appellant.

Messrs. MILLER, LEMAN & CHASE, for appellee.

This common law action lies to recover for property actually taken and appropriated to public use. *City of Chicago v. Wheeler*, 25 Ill. 478; *Clayburgh v. City of Chicago*, 25 Ill. 535; *Soulard v. City of St. Louis*, 36 Mo. 552; *Jamieson v. Springfield*, 53 Mo. 224; *Bigelow v. Turnpike Co.*, 7 Mass. 202; *Lebanon v. Olcott*, 1 N. H. 339; *Battler v. Braintree*, 14 Vt. 348; *Corwith v. Hyde Park*, 14 Ill. App. 635.

Soulard v. City of St. Louis, 36 Mo. 552, is a case illustrating this common law right of action. The plaintiff, Soulard, brought an action at law, alleging that the city, without notice to the owner or offering to make compensation, and without consent, opened and used a portion of plaintiff's land as a public street, and has ever since so used the same; that plaintiff had lately signified to defendant his assent to such opening and use on defendant's paying plaintiff the first value of such land; that the just and fair value thereof is \$8,000, and asked judgment for \$8,000. The charter of the city gave it power to open, widen, etc., streets, and provided that when it became necessary for that purpose to take private property, and no agreement could be made with the owner, the corporation should make just compensation therefor to the person whose property is so taken, and provided the manner in which property should be acquired. To this complaint the

city demurred and raised the question whether such action was sustainable, and the court sustained the action.

In *City of Chicago v. Wheeler*, 25 Ill. 478, where the city had taken property for a public street, and the damages had been assessed, an action of assumpsit on behalf of the property owner was sustained.

In *Clayburgh v. City of Chicago*, 25 Ill. 440, it was held that if the city authorities appropriate a party's land for a street, and neglect to collect a special assessment wherewith to pay him his damages, he may maintain an action on the case, or waive the tort and sue in assumpsit for the value of the land taken. The familiar principle that a tort may be waived and assumpsit for the value be maintained, is here applied to the case of the appropriation by the city of real estate for public use. The court say:

"It was objected that as this court had held that assumpsit might be maintained for the value of the land appropriated, the action of case would not lie. In many cases the party injured has his election whether he will sue in trespass or case, or will waive the tort and proceed for the value of the property. So in this case the plaintiff might rely upon the wilful refusal of the city authorities to discharge their duty, by which he has sustained injury, or he may waive the tort and proceed for the recovery of the value of the land which they have appropriated to the use of the city. We have no hesitation in saying that he may elect as to which form of action he will resort."

If the city had the power, after first taking plaintiff's property, to impose upon her the right of the city to get the money with which to pay her by a special assessment to be made, she could not be compelled to wait indefinitely therefor. This suit was brought two and one-half years after the judgment was entered in the condemnation case fixing the value of the land. After such a delay the city can not say that she shall wait longer to see if a special assessment can be collected. The city must show reasonable diligence and success.

In *City of Chicago v. Wheeler*, 25 Ill. 478, it was held that a delay of two years in collecting a special assessment was unreasonable, and made the city liable to action.

It is plain, however, that under the constitutional provision which authorizes private property to be taken for public use only on payment made, and not before payment, it is incompetent, either for the city, or the legislature, or the court, in any way to compel appellee to delay a day in demanding payment of, and bringing suit to collect for her land, which has been already taken for public use. When her land has been in fact taken, then the compensation is absolutely due. *Phillips v. South Park Commissioners*, 119 Ill. 626.

Even where, under constitutional provisions, it is competent for the legislature to authorize municipal corporations to take private property for public use without first making payment, it is held to be necessary that the legislature should also make certain and adequate provision by which the owner can coerce the payment of compensation without unreasonable delay. 2 *Dillon on Mun. Corp.* Sec. 615, and authorities cited. In *People v. Hayden*, 6 Hill, 361, Mr. Chief Justice Nelson says:

"Although it may not be necessary, within the constitutional provision, that the amount of compensation should be actually ascertained and paid before property is thus taken, it is, I apprehend, the settled doctrine, even as respects the State itself, that at least certain and ample provision must be first made by law (except in cases of public emergency), so that the owner can coerce payment through the judicial tribunals, or otherwise, without any unreasonable and unnecessary delay. Otherwise, the law making the appropriation is no better than blank paper."

In this State the constitution requires the payment of the compensation before the taking of the property can be given by law, and any statute or ordinance which purports to give the right to take private property before compensation is paid is unconstitutional and void; and the validity of every act, proceeding or judgment prior to payment is conditional upon payment being made, and void and of no effect if it is not made. It is the payment that gives the right to take; and, as soon as the property is taken, the property owner's right to immediate payment is fixed. The compensation is then

due. *Cook v. South Park Commissioners*, 61 Ill. 115; *People v. McRoberts*, 62 Ill. 38-45; *City of Chicago v. Barbian*, 80 Ill. 484-6; *Schreiber v. C. & E. R. R.*, 115 Ill. 340; *Phillips v. South Park Commissioners*, 119 Ill. 626.

MORAN, J. This was an action to recover from the city for the value of a strip of land which it had appropriated for the purpose of a public street.

In pursuance of an ordinance providing for opening and widening the street in question, a petition for condemnation of this strip with other land was filed in the Superior Court on October 6, 1881, and the compensation to be paid for the land was fixed at \$950. It was proved that the city took possession of the land April 9, 1881, some six months prior to the filing of the condemnation petition, and the court in this suit allowed interest on the value of the land from the date of such taking possession, and rendered judgment against the city for the value of the land and such interest in the amount of \$1,349.

The ordinance authorizing the condemnation provided that the improvements should be made, "and the costs thereof paid for by a special assessment to be levied on the property benefited thereby to the amount that the same may be legally assessed therefor, and the remainder of such costs to be paid by general taxation," and the city offered to prove that it had been unable to collect the special assessment levied to pay for the improvements, and counsel for the city now contend that this case is governed by *The People v. Hyde Park*, 117 Ill. 462, and *Village of Hyde Park v. Corwith*, 112 Ill. 441.

We are of opinion that those cases do not control here. In those cases the ordinance declared that the entire cost of the improvement should be paid for wholly by special assessment, and the court declined to coerce the village into adopting another method of paying for the land to be taken. Here such part of the cost of improvement as should not be levied on property benefited is to be paid by general taxation. If, therefore, the city has not succeeded in finding property benefited, or has failed for any reason to collect assessment made

Lehman v. Clark.

on property being benefited, the deficiency is to be made up from the general fund.

The value of the land was due to the owner from the time the city took possession, and we think it simple justice to allow interest from that time. *Phillips v. South Park Commissioners*, 119 Ill. 626. The judgment of the Superior Court will be affirmed.

Judgment affirmed.

GEORGE LEHMAN & SONS COMPANY, IMPLEADED, ETC.,
v.

ARTHUR R. CLARK AND JOHNSON S. FINDLAY.

Mechanic's Lien—Title—Resulting Trust—Sale.

Upon a petition for a mechanic's lien this court holds that the labor and material of plaintiffs went into the building in question; that the person in whom was vested the title thereof, held the same in trust for the defendant company; that although no time was fixed for the completion of the work, the statute was satisfied by its being done within one year, and declines to interfere with a decree for the plaintiff.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. O. H. HORTON, Judge, presiding.

Mr. CHARLES J. BEATTIE, for appellants.

Messrs. MORRIS & GANSE, for appellees.

GARNETT, P. J. The facts out of which this litigation grows, are, that David H. Keyes, being the owner of a parcel of ground with a frontage of fifty feet on Wabash avenue, in Chicago, on July 20, 1886, made a contract with appellees and the George Lehman & Sons Company, by which it was

agreed that Clark & Findlay should supply all labor and material necessary to complete the carpenter work for a building to be erected on the south 16 $\frac{1}{2}$ feet of said premises, and should construct another building on the north 16 $\frac{1}{2}$ feet thereof, and in consideration thereof Keyes agreed to convey the north 16 $\frac{1}{2}$ feet to Clark & Findlay; also that said company should supply the labor and material necessary in doing the mason work for the building on the south 16 $\frac{1}{2}$ feet, and should construct another building on the center 16 $\frac{1}{2}$ feet of the premises, and in consideration thereof Keyes agreed to convey the center 16 $\frac{1}{2}$ feet to the company. By another contract dated July 22, 1886, Clark & Findlay agreed with said company to furnish all the material and labor necessary for the carpenter work on the building to be erected on the said center 16 $\frac{1}{2}$ feet, and the company agreed to pay them therefor \$2,333. On the same day another contract was made by which the company agreed with Clark & Findlay to furnish the labor and materials for the mason work of the building to be erected on said north 16 $\frac{1}{2}$ feet for the sum of \$2,033.

To carry out the scheme thus initiated, it became necessary that the company should procure a loan of \$6,500 on the premises which Keyes had agreed to convey to it. Accordingly application was made for the loan to E. S. Dreyer & Company by George Lehman, in behalf of the company, in which he was manifestly the controlling spirit.

Dreyer & Company declined to make a loan to the company, but suggested that the title should be placed in an individual, and that the latter should execute the papers for the loan. The stock of the company was owned by George Lehman and his family, one of the stockholders being his son, Hibbert J. Lehman. In pursuance of the suggestion made by Dreyer & Company, George Lehman arranged to have the title conveyed to his son Hibbert, and it was so conveyed on August 20, 1886, and the trust deed and notes to secure the loan were made by Hibbert. The latter paid no money then or at any time for the property. All the money secured by the loan was paid out from time to time, by the lender, for the purpose of paying for the building and completion of the

Lehman v. Clark.

house on the center 16½ feet. The other two buildings were also erected and completed in conformity to the contracts above set forth, and certain extra labor and materials were furnished by Clark & Findlay for the center house.

About July 1, 1887, an adjustment was made between Clark & Findlay and the company, and it was found that there was coming to Clark & Findlay \$300 more for carpenter work and extras, on the center house, than was due to the company for mason work on the north house. Thereupon the company made and delivered to Clark & Findlay its note dated July 1, 1887, payable sixty days after date, for said \$300 with interest at seven per cent per annum. Default was made in payment of this note, and appellees filed their petition in the Circuit Court to enforce a mechanic's lien against said center 16½ feet and the building thereon, for the amount of the note and interest. A decree having been entered as prayed for, an appeal was taken by the company, Hibbert J. Lehman and Phillip Lichtenstadt, the latter being the holder of a note secured by a trust deed to William G. Witherell, dated February 16, 1887.

There is not even plausibility in the contention that the evidence fails to prove that the labor and materials represented by the \$300 note were put into the building in question. Clark testifies, in substance, that they were, and it is an undisputed fact that the settlement, which culminated in the execution of the note, was in relation to the north house and the center house, and as Clark & Findlay did no work for the company on any house except the center one, the balance found due must have been for labor and material furnished on that house. In the amended petition it was alleged that Hibbert J. Lehman held the legal title to the premises, as a trustee for the company. The defendants denied this in their answer and on the hearing before the master both George Lehman and Hibbert J. testified that the latter was the absolute owner and that the company had no interest therein. Whether one or the other was the owner, and whether Hibbert merely held the title in trust for the company, are questions of law that these witnesses can not be permitted to settle

by giving their opinion under oath, so as to affect the interest of third parties. Neither of the witnesses testified to any fact which has a tendency to shake the implication of law that there was a resulting trust in favor of the company. Hibbert paid no money or other valuable things for the premises; the entire consideration therefor was paid by the company by furnishing labor and material for Keyes' house, and it is a fair inference from the entire record that it was the intention of all the parties that Hibbert should take the title merely for convenience of the company, and in order to secure the loan. That a resulting trust arises, in such cases, in favor of the party from whom the consideration moves, is familiar law. 1 Perry on Trusts, Sec. 126.

No time was fixed for the completion of the carpenter work by Clark & Findlay, but as the contract was partly expressed in the terms of the written agreement, and the time of completion was left without any provision, the law raised an implied obligation on their part to complete the work within a reasonable time. Having finished it within a year the statute was satisfied, and their right to a lien became vested. *Driver v. Ford*, 90 Ill. 595.

By the terms of the decree the property is ordered to be sold subject to the liens of the trust deeds to Dreyer and Witherell, so that no ground of complaint remains for any of the parties interested in those incumbrances, nor can the company or Hibbert J. Lehman object to this feature of the decree, as their interests are in no wise affected thereby. The decree is affirmed.

Decree affirmed.

HENRY L. WAARICH

v.

SOPHIA WINTER.

38	38
43	451
33	36
54	257

33	36
118	*621

Criminal Law—Assault and Battery—Trespass—Continuance—Illness—Physician's Certificate—Discretion.

Waarich v. Winter.

1. A court is not bound to grant a continuance on the certificate of a physician.

2. The improper introduction of counter affidavits on a motion for a continuance will not amount to reversible error, where those in support thereof are insufficient.

3. Affidavits in support of such motion must not only show that illness prevented presence at trial but also the existence of a defense. Merits must always be shown upon such an application.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County ; the
Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. CUTTING, AUSTIN & HIGGINS, for appellant.

Mr. STACY W. OSGOOD, for appellee.

MORAN, J. This was an action of trespass for an assault and battery, brought by appellee against appellant. When the case was called for trial, appellant's attorney moved the court for a continuance on account of the sickness of appellant, and in support of such motion filed an affidavit stating that appellant had informed him, the attorney, by letter, some two or three days before, that he was sick, but expected to be sufficiently recovered to be in court when his case was called; but that on the evening before, on returning to his house, the attorney learned that a member of appellant's family had left word for him that appellant was sick, and also left a certificate of a practicing physician, stating that appellant was ill, confined to his house and in the care of said physician; that appellant resided some twenty-three miles in the country and some distance from a railroad or telegraph, and that the attorney could not safely proceed to trial without the presence of said appellant. Thereupon appellee presented to the court two affidavits in which it was shown that said appellant was seen by the affiants the evening before, attending to his work about the farmhouse and barn, and that he was not sick. The court overruled the motion for a continuance and the case was heard before a jury and a verdict rendered against appellant for \$300.

A motion for a new trial was made, and appellant's affidavit was filed in support thereof, in which he swears that he was sick on the day of the trial, and under the doctor's charge, who advised him that it would be dangerous for him to leave his house; that if given a new trial he will prove that the injuries received by appellee at the time and place mentioned in the declaration "were due entirely to her own acts or the necessary acts of this defendant while acting solely in his own defense; that he did not attack said plaintiff and beat her as in said declaration alleged, but on the contrary she attacked him, injuring him to a considerable extent, and that if said plaintiff was at all injured by him, it was while he was using what force was necessary to repel her attacks, and in no other way." The court overruled the motion for a new trial, and rendered judgment on the verdict, and from said judgment the appeal is taken.

There is no ground for reversal. The court was not bound to grant a continuance on the certificate of a physician. *Schnell v. Rothbath*, 71 Ill. 84. While the court erred in allowing counter affidavits to be read on the motion for continuance, such error will not constitute ground for reversal where the affidavits for continuance are not sufficient. In such case the counter affidavits will not be regarded as inducing the refusal of the continuance. *Wick v. Weber*, 64 Ill. 167; *Quincy Whig Co. v. Tillson*, 67 Ill. 351. The application may have been such as addressed itself to the discretion of the court, and upon such a matter the court could, as it seems to us, inform itself fully from the sworn statements of both parties in order to guide its discretion, the application being made for a favor, and not for a right. *Ault v. Rawson*, 14 Ill. 484.

The affidavits filed in support of the motion for new trial, probably sufficiently establish that appellant was prevented by sickness from being present at the trial, but they wholly fail to show by the statement of facts that appellant had any defense. Appellant states his conclusions that the injuries inflicted on appellee by him were inflicted in self-defense, but conclusions from facts are for the court or jury and not for the witness. The affidavits should have stated the facts

Heissler v. Stose.

and circumstances of the quarrel, if there was one, so that the court might see that the conclusions which appellant drew were supported by the facts which he could swear to.

Merits must be always shown on such an application. *Waugh v. Suter*, 3 Ill. App. 271; *Slack v. Casey*, 22 Ill. App. 412; *Stenzel v. Sims*, 25 Ill. App. 538. The judgment of the Superior Court must be affirmed.

Judgment affirmed.

GARY, J., took no part in the determination of this case in this court.

JACOB HEISSLER AND AUGUST JUNGE

v.

CHARLES STOSE.

Landlord and Tenant—Recovery of Rent—Action of Debt—Appraisers—Disagreement—Interest—Evidence.

1. In an action of debt for the recovery of rent, this court holds that the intention of the parties to the lease was for the payment of rent monthly in advance, and that the fact that the amount of each installment was uncertain through failure of appraisers to agree in accordance with a clause therein, was no defense to the claim for interest upon each monthly sum found to be the reasonable rental value of the premises in question.

2. Rent in advance can not be recovered in the absence of an agreement to that effect.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

The declaration in this case was in debt, and avers that appellee, on December 4, 1887, executed a lease to appellants of 347 and 349 State street, in the city of Chicago, for a term from May 1, 1878, to May 1, 1888, at a rental from May 1,

1878, to May 1, 1879, of \$110 per month, payable on the first day of each month, and from May 1, 1879, to May 1, 1884, \$125 per month, payable on the first day of each month, and further providing that the rental from the first day of May, 1884, until the first day of May, 1888, should be fixed by three appraisers, one to be selected by the plaintiff, Stose, and one by the defendants, Heissler and Junge, and the two thus selected to choose a third, and the three to fix the rental; that prior to the first day of May, 1884, the plaintiff selected James Campbell and the defendants selected Charles Kosminski, and the two thus chosen selected James C. Sinclair as a third appraiser; that the three appraisers met; that Campbell and Sinclair agreed upon the rental value of said premises, but that Kosminski refused to agree with them upon the rental value determined by said Campbell and Sinclair; that defendants had notice of such disagreement, and that "by means thereof said defendants became liable to pay to the plaintiff so much money on the first day of each and every month from the first day of May, 1884, for and during and until the first day of May, 1888, as rent for the use and occupation of said premises, as the same are reasonably worth, and that the same are reasonably worth the sum of \$250 per month;" that by virtue of said demise, the defendants entered into the possession of said premises, and retained possession from the first day of May, 1878, until the bringing of the suit, "when a large sum of money, to wit, the sum of \$10,000, for the use and occupation of said premises by the defendants, of the plaintiff, from the first day of June, 1884, to the first day of May, 1887, became due from the defendants to the plaintiff; that the defendants, though requested, etc., have not paid the sum of money, and therefore," etc.

Second count sets forth the lease, the covenant in respect to the selection of appraisers, their refusal to agree, and notice to the defendants of such refusal, and "by means whereof said defendants became liable to pay the plaintiff so much money on the first day of each and every month, from the first day of May, 1884, for and during and until the first day of May, 1888, as rent for the use and occu-

Heissler v. Stose.

pation of said premises, as the same are reasonably worth, and that the same are reasonably worth the sum of \$250 per month." That by virtue of said demise the defendants entered into the possession of the premises, and were possessed thereof from May 1, 1878, to and until the time of the bringing of this action, "when a large sum of money, to wit, the sum of \$10,000, for the use and occupation of said premises of the plaintiff by the defendants, from the first day of June, 1884, to the first day of May, 1887, became due from the defendants to the plaintiff; that the defendants, though often requested, etc., have not paid the sum, therefore," etc.

Two additional counts were filed, the first averring that on June 1, 1887, the defendants were indebted to the plaintiff in the sum of \$8,750, for the rent of 347 and 349 State street, from the first day of June, 1884, to the 31st day of May, 1887, at a monthly rental of \$250 per month, together with interest at the rate of six per cent per annum on each monthly installment of said rent. The second averred that defendants were indebted on the 1st day of June, 1887, in the sum of \$10,000, for the use and occupation of certain premises, 347 and 349 State street, by the defendants held and used and occupied, at the request and by the sufferance and permission of the plaintiff.

There was a plea of *nil debet*, and a stipulation that defendants might introduce any evidence which might be admissible under any special plea which might be properly pleaded in said cause. On the trial a verdict was found for the plaintiff for \$7,000 debt and \$1,044 damages. Motion of defendants for a new trial was overruled and judgment on verdict, from which defendants appeal.

Messrs. WILLIAM H. BARNUM and RUBENS & MOTT, for appellants.

Messrs. WILSON & ZOOK, for appellee.

GARNETT, P. J. The damages allowed by the jury represented interest on each installment of rent, and the only ques-

tion is whether interest was recoverable. Appellant contends that there was no money due on a written instrument, and therefore Sec. 2, Ch. 74, Rev. Stat., does not warrant the recovery. There can be no doubt that there was money due when the action was commenced, otherwise the suit would be premature. And since the decision in *Stose v. Heissler*, 120 Ill. 433, it must be admitted that some amount of money, as rent, was due each month in advance. The lease in question was there construed, and the court held it to be evident that both parties contemplated the payment of rent monthly in advance, during the entire term.

If the rent was due merely by reason of appellants' occupancy and the implied undertaking arising therefrom, there is no known rule of law which would make the value of the use and occupation due each month in advance. We perceive no reason why, in the absence of any agreement, a suit might not be brought each day for the preceding day's use, but it is certain that no suit could be maintained for future use and occupation unless there was an agreement to that effect. There is, then, no escaping the conclusion that there was money due each month in advance, and that it was due on and by virtue of a written instrument. That the amount was uncertain is no defense to the claim for interest. Appellants knew when they executed the instrument that, in a certain contingency, the amount of their monthly liability would become uncertain, and they should have provided against the possibility of having to pay interest on a demand, uncertain as to its amount. To say that they did not foresee the happening of the event is no better defense than to say they did not know the law. The judgment is affirmed.

Judgment affirmed.

GARY, J., took no part in this case.

Lambert v. Hyers.

MARY L. LAMBERT ET AL.

V.

FRANCES HYERS.

Foreclosure—Redemption—Sale—Assignment of Certificate of—Deed—Writ of Assistance.

Upon an order directing the issuance of a writ of assistance in behalf of the grantee in a master's deed of real property sold under foreclosure proceedings, said grantee being the assignee of the certificate of sale, it being contended that the reversal of the decree of sale by this court subsequent to the execution and delivery of such deed operated to divest the title acquired thereby and that for such reason there was no foundation for the issuance of the writ, it is *held*: That the writ was properly issued, the facts being that the grantee in the deed was a stranger to the decree, and that the reversal was for an error only, of which the purchaser was not obliged to take notice.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

MR. C. M. HARDY, for appellants.

Messrs. FRANCIS LACKNER and MARCUS HITCH, for appellee.

If a judgment or decree is reversed for error it is a settled principle of the common law, coeval with its existence, that the defendant shall have restitution of the purchase money and the purchaser shall hold the property sold, unless, indeed, the plaintiff himself be the purchaser and still holds the title. *Fergus v. Woodworth*, 44 Ill. 381; *Voorhees v. Jackson ex dem. the Bank of the United States*, 10 Peters, 449.

Appellants were present at the sale, but gave no notice of their intention to contest the same. The appeal which they had prayed from the decree had not been perfected, although nearly four months (from February to June) had elapsed since the entry of the decree; the time for perfecting said appeal

had expired. It would be fraud for a defendant to stand by and, without giving a purchaser any notice of his claim, allow a sale to be made under a decree then in full force and not appealed from, and then be permitted to bring a writ of error years afterward and attack the sale.

GARNETT, P. J. A decree of foreclosure was entered by the Circuit Court on February 24, 1885, in a cause then pending, wherein Frances Hyers was complainant, and Mary L. Lambert, Rudolph Lambert and others were defendants. From that decree the defendants prayed an appeal, which the court allowed, but nothing was done to perfect the appeal. At the master's sale, under the decree, on June 10, 1885, the premises decreed to be sold were struck off to John C. Ender, a stranger to the decree, he being the highest bidder, and a certificate of sale delivered to him. The certificate of sale was afterward assigned by Ender to Frances Livingston, and no redemption having taken place, the master, on September 22, 1886, executed and delivered a deed in due form, conveying the premises to her. Afterward the Lamberts sued out a writ of error, and at the March term, 1887, this court reversed the decree. At the February term, 1888, of the Circuit Court, on the application of Frances Livingston, a writ of assistance was ordered to be issued to place her in possession of the premises.

The Lamberts appealed from that order, and the sole question now presented is, should the writ have been allowed? No question is made as to the notice served and demand made being sufficient to authorize a writ, but appellants contend that the title acquired by the master's deed is divested by the reversal of the decree, and that there was for that reason no foundation for the issuance of the writ.

If the complainant had been the purchaser at the master's sale, and continued to hold the title until the writ of error became *lis pendens*, the point would doubtless be in accord with the authorities. But it is the policy of the law to encourage bidding at judicial sales, and the fixed rule of this State permits a stranger to the decree to purchase, without incurring the risk of a mere error that may be developed at any time

Town of Lake v. Bok.

within five years after the decree is entered. *Feaster v. Fleming*, 56 Ill. 457; *Hays v. Cassell*, 70 Ill. 669; *Hedges v. Mace*, 72 Ill. 472; *Fergus v. Woodworth*, 44 Ill. 381; *Murphy v. Loos*, 104 Ill. 514. At the time of the decree the court had jurisdiction of the parties to, and subject-matter of, the suit.

The reversal was for an error only, which the purchaser was not obliged to search for. The order of the Circuit Court is affirmed.

Order affirmed.

THE TOWN OF LAKE

v.

JOHN A. E. BOK.

Municipal Corporations—Raising Street Grade—Flowage of Surface Water—Obstruction of—Damages—Evidence—Instructions.

In an action against a municipal corporation, to recover damages for obstructing the flow of surface water by raising the grade of a street, this court holds that a harmless erroneous instruction touching the measure of damages can not be complained of, and declines to interfere with a verdict for the plaintiff.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MR. R. P. HOLLETT, for appellant.

MR. JOSEPH N. BARKER and CLIFFORD, SMITH & FREY, for appellee.

GARY, J. This is an action by the appellee against the town for obstructing the flow of surface water from his land, by raising a street. This is a cause of action in this State,

though great differences of opinion on the subject exist elsewhere. *Gormley v. Sanford*, 52 Ill. 158; *Gillham v. Madison R. R. Co.*, 49 Ill. 484; *Angell on Watercourses*, Sec. 108 *et seq.* The fact whether the land of appellee was affected, as he claimed, was settled by the verdict of the jury, upon conflicting evidence, in his favor.

There is in the case an erroneous instruction as to the measure of damages, which seems to have arisen by mere inadvertence, using "and" in place of "or," by which the jury are permitted to give to the appellee the cost of getting his crop to the state it was in, and the value of it as it was, instead of giving one or the other. But this instruction did no harm. If he was entitled to recover at all, no computation, based upon the testimony, could make his damages less than nearly or quite double all he has recovered. The judgment can not be disturbed. *East St. Louis v. Flynn*, 19 Ill. App. 64.

Judgment affirmed.

PATRICK MORAN ET AL.

v.

JOHN HOPE GORDON ET AL.

Sales—Consignments—Advances—Draft for—Refusal to Accept—Evidence—Practice.

1. Whether silence, for an unreasonable time after receipt of an account, amounts to an admission of its correctness, or delay in noticing the same was unreasonable, are questions for the jury.

2. The finding of a court in a given case is entitled to the same respect as the verdict of a jury; and in a trial by a court its decision will ordinarily be reversed or affirmed by the same rules which govern when the facts are tried by a jury.

3. In an action brought to recover advances, freight charges, etc., alleged to be due upon a shipment of butterine, the contention being as to whether the goods were sold or consigned, this court declines, in view of the evidence, to interfere with verdict for plaintiff.

[Opinion filed April 17, 1889.]

MORAN v. GORDON.

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. CLIFFORD, SMITH & FREY, for appellants.

Messrs. S. E. DALE and F. W. BECKER, for appellees.

GARNETT, P. J. Appellees, who are surviving members of the firm of Fraser, Gordon & Co., sued appellants in the court below to recover a balance alleged to be due appellees for advances, freight, etc., on fifty tubs of butterine shipped in 1880 by appellants from Chicago, to Fraser, Gordon & Co., at Glasgow, Scotland. By stipulation a jury was waived and the cause submitted to the court for trial. Appellees had judgment, from which this appeal is taken. The suit is occasioned by the fact that there was a loss on the sale of the property, appellants contending that the goods were sold by them to the Glasgow house, while the appellees claim they were consigned. On the trial, evidence was given tending to prove that prior to the time in question appellants had made quite a number of shipments of goods to the Glasgow house, and that they were all consignments. It also appeared from the evidence in the case, which consists largely of correspondence between the parties, that after the goods were shipped, and before they arrived at Glasgow, there was a misunderstanding as to the character in which appellees were to receive the goods, whether as purchasers or factors. Appellees having declined to accept the draft against the shipment on the ground that it was more than its full value, and asserting that the member of their firm with whom the arrangement was made understood it to be a consignment, were induced, nevertheless, to make the acceptance, on receipt of a letter from appellants, in which they said, "We don't want any ill-feeling to arise from a little thing like this, and had rather lose the full amount. We want the draft paid anyway, and if it is not right we will make it right." Appellees might have supposed from this letter that appellants meant that although they considered it a sale, yet they would not insist upon that con-

struction of the transaction, and all they cared for was that they should not have imposed upon them the discredit of drawing against a shipment without right to do so. From that time on appellees consistently, and at all times, treated and wrote of the butterine as the property of appellants. November 19, 1881, sale was made and account sales at once transmitted by appellees to appellants, showing balance due to appellees as claimed in this suit. Appellants admit the receipt of the account, and it is admitted that no answer was made thereto until February 16, 1882. The failure to object to the account was evidence tending to prove an account stated. 1 Greenl. on Ev., Sec. 212; 1 Taylor on Ev., Sec. 810.

Whether silence for an unreasonable time, under such circumstances, amounts to an admission of the correctness of the account, and whether the delay was unreasonable, are questions of fact for the jury. *Hagenbaugh v. Crabtree*, 33 Ill. 225. In this case the court took the place of the jury, and its finding is to be treated with the same respect as the verdict of a jury. If the evidence would have warranted the latter in returning a verdict for the plaintiff it was sufficient foundation for the finding of the court. In trials by the court the general rule is, that "the decision will be reversed or affirmed by the same rules which govern when the facts are tried by a jury." *Field v. C. & R. I. R. R. Co.*, 71 Ill. 461.

There being evidence to support the finding, and no error of law having been committed, the judgment will be affirmed.

Judgment affirmed.

ROBERT W. CLARK

V.

THOMAS SCANLAN.

38 48
50 568
33 48
64 506

*Master and Servant—Building Contractor—Wrongful Discharge—
Recovery for Partial Performance—Damages—Evidence—Instructions.*

Clark v. Scanlan.

1. In an action brought by a contractor, discharged before the completion of his labors, to recover for services rendered, this court holds that the admission of evidence touching the reasonable worth thereof was erroneous, and that it should have been shown what the work and material furnished were worth according to the contract price.

2. In the case presented it is *held*: That the fact that the court gave the jury an instruction, stating the correct rule of damages, upon request of the defendant, will not cure the error committed in giving an erroneous one in behalf of the plaintiff, there being no evidence in the record as to the true rule on which to base a verdict, it being apparent that the erroneous rule was followed in arriving at the same.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This action was brought by appellee to recover for certain mason work done for appellant. The declaration contained the common counts and a special count, which alleged the making of a contract by plaintiff to build and complete for defendant the substructure of a residence, including stone and brick work, etc., according to plans and specifications, and to the satisfaction of the architect, for the sum of \$1,275; that plaintiff began the work and proceeded until it was discontinued in the fall of 1886, by the orders of appellant, until settled weather should arrive in the spring of 1887. That plaintiff was and always has been ready to complete said work according to agreement, but defendant refused to allow plaintiff to do so, and canceled the said contract and prevented plaintiff from completing said work, and wrongfully discharged plaintiff from any further performance thereof, and retained all the material and labor of plaintiff, whereby plaintiff has lost said labor and material, and the profits and advantages he would have derived by the completion of said work, etc. Defendant pleaded the general issue and set-off. There was a trial by jury and a verdict for \$1,200 against defendant, and from the judgment rendered thereon this appeal is prosecuted.

Messrs. T. H. GAULT and D. H. PINNEY, for appellant.

Under the proofs in this case there can be no question of the utter worthlessness of the structure as made by appellee. On whom shall the loss fall, is the question to be settled. The court below instructed the jury in effect that no matter whose fault it was, if the work was done under the direction of the architect, then the contractor should recover.

Even the certificate of an architect can not dispense with the performance of any substantial part of the contract. *Bond v. Newark*, 4 C. E. Green (N. J.), 376.

Nor will the acceptance of a different class of work by the architect bind the owner. *Gracius v. Black*, 50 N. Y. 145.

"The duty of the architect was to see that the contract was faithfully fulfilled according to the agreement. Appellant had a right to insist upon a strict compliance with the agreement, and, unless specially authorized, the architect could not change its terms. If he might to the extent claimed in this case, he might as to any and every part of its terms, specifications and conditions. This no one would claim." *Adlard v. Muldoon*, 45 Ill. 194.

While this is not an action on the contract where a certificate had been given—nor an action on the contract alleging fraud on the part of the architect in refusing to give a certificate—still the same principle, so far as applicable, would apply.

The allegations of the declaration are, that appellant and appellee entered into a written contract for the building of a substructure or basement, which was to be built by appellee according to contract plans and specifications and to the satisfaction of the architect. The work progressed until a certain time, when, by orders of appellant, work was discontinued until settled weather in the spring, and that the appellant refused to permit appellee to fully complete the job, etc.

Under such a complaint recovery could be had (if at all) for the value of the labor and material. *Guerdon v. Corbett*, 87 Ill. 272.

If the price is not fixed by the contract then a recovery could be had for the value of the service. *Eyer v. Weissgerber*, 2 Iowa, 463.

Clark v. Scanlan.

If the price is fixed by the contract and a party is prevented from performing, then he may recover in proportion to the stipulated price. *McCarsland v. Creasep*, 3 Greene (Iowa), 161.

The correct mode of determining the value of satisfactory work on an unfinished contract is the contract price, less what it would cost to complete it. *Gowzales v. McHugh*, 21 Tex. 259.

The measure of damages is what it would cost to procure the work necessary to be done to make the building conform to contract. *Smith v. Bristol*, 33 Iowa, 24.

In no case can a recovery be had for more than the contract price, and a recovery can not be had for that unless the work is reasonably worth it, or if, by paying it, the rest of the work will cost the defendant more than if the whole had been completed under the contract. *Allen v. McKibbin*, 5 Mich. 447.

The measure of damages, if the work had been good, would be the contract price, less what it would cost to finish the job. If, however, as in this case, the work was so poorly done as to be of no value, or if it cost the appellant more to rebuild and complete the structure, so as to make it as good as the contract price and specifications required it to be, then no recovery could be had at all; and the great weight of evidence in this case shows that the work done and material furnished left a structure wholly unfit to build upon, and that the cost to rebuild was greater than the contract price.

MR. EDWARD MAHER and JOHN C. SIMONDS, for appellee.

Under the contract in this case the architect and superintendent was the agent of the owner and the arbiter of all disputes. If he was the arbiter it became the imperative duty of the appellee to obey his directions. If he so obeyed directions and injury thereby resulted the contractor was not blameworthy. If not blameworthy he was entitled to recover in this action.

The agreement in evidence established the *status* of the contracting parties. Scanlan submitted himself to the will of the architect. The work was to be done "to the satisfac-

tion of and under the direction of the architect." So, "if any dispute should arise between said parties in relation to the contract, or work to be performed under it, or in relation to the plans, drawings and specifications (or alterations), the decision of G. Isaacson, architect, shall be final and binding on all the parties hereto."

The architect acts for the owner. If the owner may be bound by an agent in any transaction or contract, he may be bound in a building contract where he expressly designates his agent and charges him with express duties.

The relation of principal and agent exists where an architect acts for the owner in superintending the erection of a building. Emden's Building Law, 65-6; *Kimberly v. Dick*, L. R. 13 Eq. 1.

The relationship corresponds with that of master and servant, and the maxim, *qui facit per alium facit per se* applies. *Brown v. Acerrington Cotton Co.*, 3 IL. & C. 511; Emden Building Law, 65-6.

The English courts have decided that, when a matter in dispute in the contract is submitted to an architect, his determination of the subject is in the nature of an award. *Wadsworth v. Smith*, L. R., 6 Q. B. 332.

In cases not involving the precise points at issue in this case, our own Supreme Court hold that the decision of the architect is conclusive, where the contract provides his decision shall be final on all questions of difference arising under the contract. *Downey v. O'Donnell*, 86 Ill. 49; *Finney v. Condon*, 86 Ill. 78; *Downey v. O'Donnell*, 92 Ill. 559; *Snell v. Brown*, 71 Ill. 134.

Several cases are cited by counsel for appellant in support of the theory, that the certificate or approval of the architect does not waive the right of the owner to have a substantial compliance with the contract. Chiefly they seem to rely on *Adlard v. Muldoon*, 45 Ill. 194; *Bond v. Newark*, 4 C. E. Green (N. J.) 376; *Gracius v. Black*, 50 N. Y. 145.

It is respectfully submitted to this court that these cases do not control the case at bar. Each of them is distinguishable from this. In the *Adlard* case the architect undertook to

approve performance, where there were palpable omissions and distinct variations and alterations in the contract. Gas-pipes were left out of bed-rooms. The newel posts, brackets and cornices were altered and varied. The architect justified his conduct by showing that extra work had been done as compensation. The court very rightfully held that the architect could not alter or vary the agreement. This is certainly different from the present case, where a dispute as to method of doing the work arose. Also in the bond case (*ubi sup.*) the court said that an architect could not accept a brick house where a marble house was contracted for, "but the architect may say that the work was done in a workmanlike manner or of proper materials of the kind required." Bond v. Newark, 4 C. E. Green, (N. J.) 376; Bonnet v. Glattfeldt, 120 Ill. 176.

The very questions involved in this case have been twice before the Supreme Court of Illinois. The doctrine seems fully declared and may be pronounced *res adjudicata*.

In the first case the court held the contractor bound by the terms of the contract. If he agreed to perform the work to "the satisfaction and under the direction of the architect," he must do so. "An express contract admits of no departure from its terms." Clark v. Pope, 70 Ill. 131-2.

If there was doubt as to the plans, etc., it was the duty of the contractor to apply to the architect for directions. If he relied on his own skill he would have to bear the consequences. This decision makes it the duty of the contractor to apply for directions. Clark v. Pope, 70 Ill. 133.

Again, in a recent and well-considered case, where the contract was that "the architect was appointed superintendent, with full power to inspect, accept and reject any work done or material furnished, whether worked or otherwise, when the same should not be in accordance with the plans and specifications, and that his decision on the matter should be binding and conclusive on the parties," the error assigned was the refusal of an instruction, which said that "it was the duty of the plaintiff to take down and rebuild a wall in a workmanlike manner, and that no instructions of the superintendent [architect] could relieve the plaintiff from the duty

imposed by that agreement." This instruction was refused. It presents the very same ideas contained in the fourth and fifth instructions refused in this case. Mr. Justice Sheldon, in delivering judgment, said:

"There might well have been a difference of opinion as to how much of the walls should be taken down. We think under the agreement the architect was constituted the judge in this respect, whose decision should be binding and conclusive on both parties; and if he determined to what extent the walls should be taken down then the plaintiff would have been justified in following the directions of the architect." *Bonnet v. Glattfeldt*, 120 Ill. 176.

There was some evidence in the case that Mr. Clark insisted on more mortar. If he did, he also is directly responsible. If the owner is responsible for the acts of his architect, *a fortiori*, he is liable for his own. Where the defect in the work is occasioned by the owner, the contractor is not thereby responsible. *Vermont St. M. E. Church v. Brose*, 108 Ill. 207.

MORAN, J. The evidence introduced by appellee tended to show that he performed the work under the special contract which was introduced in evidence, and under the express direction and constant superintendence of the architect mentioned in the contract, and that he was ready and willing and offered to complete the work; that he was prevented from so doing by appellant, who declared the contract forfeited and canceled. There is in the record a conflict of evidence as to the manner in which the work was done and as to delay in doing the work, and who was to blame therefor, but it is agreed on all hands that the work was not completed, and that a material portion of that called for by the contract remained to be performed, when appellant notified appellee that he would not allow him to proceed further with the job. If it be assumed that the controversy, with reference to the manner and time of performance of the work, is settled by the verdict in favor of appellee, and that the effect of the verdict is to establish that the forfeiture of the contract by appellant was wrongful, still the verdict can not stand, for the

reason that the court gave to the jury an improper measure of damages. The court gave to the jury at appellee's request, the following instruction:

"In this case if the jury find from the evidence that the plaintiff, Scanlan, was stopped or prevented by defendant from completing the work without the fault of said Scanlan, then and in such case the jury should render a verdict for plaintiff, and in assessing damages give him such sum as the material furnished, work and labor done, was reasonably worth, if such work was done and material furnished. It is well settled in this State that when a suit is brought to recover for work done or material furnished under a special contract, the stipulations of the contract must govern as to the value of such work and materials, and the contractor can not recover upon a *quantum meruit* or *quantum valebant* in disregard of the prices fixed by the contract, notwithstanding he may have been prevented from completing the contract by the wrongful act of the other party to the contract." *City of Chicago v. Sexton*, 115 Ill. 230.

The fact that the court at the request of appellant gave to the jury an instruction stating the correct rule will not cure the error in this case, even if the jury might be left to choose which of the two different rules of damage stated to them by the court they would follow; for the reason that there is no evidence in the record on the theory of the true rule on which to base the verdict. The only evidence introduced by appellee, as to damages, is his own answer to the question, how much the work done and material furnished by him was reasonably worth—that it was worth \$1,200, and he had never been paid any of it. There is no proof whatever of the value, according to the contract price, of the work and material furnished, and as the jury rendered a verdict for \$1,200 it is evident that appellee's rule of damages was adopted. It was error to admit evidence as to what the work was reasonably worth. It should be shown what the work and material furnished were worth according to the contract price. For the error pointed out the judgment will be reversed and the cause remanded.

Reversed and remanded.

THE VILLAGE OF LA GRANGE

V.

HERMAN BENZE.

*Master and Servant—Municipal Corporation—Local Improvements—
Special Assessments—Commissioner's Compensation—Recovery of.*

Where a municipality retains a person as commissioner to make a special assessment, the necessary preparatory work which he may do before taking the oath of office, is a part of the service for which he should be paid, and he is likewise entitled to compensation for services rendered before his appointment, if the same were performed at the request of the municipal authorities.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. LYMAN & JACKSON and H. V. FREEMAN, for appellant.

Mr. ADOLPH F. C. MUELLER, for appellee.

GARY, J. This record shows that in the summer of 1886 the appellants, proposing to construct sewers in the village, the expense to be defrayed by special assessment, retained the appellee to render service as a commissioner in making such assessment. Such commissioners are, under the law, appointed by the County Court, but it is well known that in practice the court acts upon the suggestion of the attorney of the municipality, in designating the persons who shall serve. The commissioners for this assessment took the oath of office August 19, 1886, and certified to the assessment role, in detail, the 30th of the same month.

Upon these facts the appellants contend that, until his appointment as commissioner, the services of the appellee could not begin, and being ended on the completion of the roll, the question is: "What were Mr. Benze's services, between August 19, 1886, and August 30, 1886, in assisting in making this

Village of La Grange v. Benze.

assessment, worth?" There is no statute by which the compensation is fixed. Either the appellee is entitled to nothing or to a reasonable compensation for the actual service.

The appellants admit, at least do not dispute, that the village is responsible for such reasonable compensation. The appellee testifies that he was retained in the latter part of July, 1886, and very urgently solicited to undertake the business, so as to get the roll ready for the September term of the County Court; that he told the village authorities that the time was too short; he would have to stop all other work, and then it would be doubtful whether he would be able to get it out; that he did all the figuring and made the calculations; although there were three commissioners, usually one man had the work to do, and that he worked at it six weeks, not only during the day time, but of evenings, including Sundays. None of this testimony was disputed, and is now only met by the assertion that the services of the appellee could not begin until he had been appointed commissioner.

The date of his appointment does not appear in the record. It does appear that the village ordinances ordering the construction of sewers were passed June 25, 1886. When a commissioner has been appointed, though he has not taken the oath of office (or, even before his appointment, if at the request of the village authorities), the necessary preparatory work that he may do for making a just and equal assessment is a part of the services, for which he should be paid, as much as the actual results of such preparations when embodied in the roll.

The evidence as to a reasonable compensation ranged from \$150 to \$900 for the work, as a whole, or as a *per diem* about \$15 per day. The court allowed \$375, probably as the result of a calculation of twenty-five days' service, at \$15 per day, and not encouraging the appellee to work hereafter nights and Sundays.

This finding of the court, with no other complaint than as to the amount, is an end of the controversy, and the judgment is affirmed.

Judgment affirmed.

J. OBERMANN BREWING COMPANY**v.****CHARLES H. GURNEY.***Negotiable Instrument—Note—Due Bill—Mistake as to Meaning of.*

An erroneous interpretation of the terms of a due bill by its maker is no defense to an action thereon.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. SIDNEY C. EASTMAN, for appellant.

Messrs. WEIGLEY, BULKLEY & GRAY, for appellee.

GARNETT, P. J. Appellee sued appellant in an action of assumpsit in the Superior Court on a written instrument, which reads as follows:

\$400.

CHICAGO, Sept. 25, 1885.

Due Gustav Weishaupt, the sum of four hundred dollars for value received. Interest six per cent from date until paid. Said sum to be paid in full one year from date. It is further agreed that we will pay him on account of said sum during said year such sums as our books show credit due to Charles Clark from day to day.

J. OBERMANN BREWING COMPANY,

(Limited)

By G. J. OBERMANN, Vice-president.

Weishaupt indorsed and transferred the paper to appellee, for whom judgment was given. The defense now urged is in effect that appellant's officer, who attended to the transaction, did not understand the legal effect of the instrument. No claim is set up that the execution of the instrument was procured by fraud and circumvention. The vice-president, who wrote the signature, admits that he knew at the time what was in the paper, and says he ought to have known better

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than to sign it, but he had confidence he was being protected. That was the time to provide for appellant's protection, if any was agreed on. The understanding of appellant, or its erroneous interpretation of the terms of the writing, can not be interposed as a defense. The words are plain and unambiguous, the consideration was sufficient in law, and we see no reason to disturb the judgment.

Decree affirmed.

FRANK R. BAKER

v.

ROBERT STRAHORN AND JULIETTE STRAHORN.

Adoption—Act of February 27, 1874, Chap. 4, R. S.—Divorce of Parents—Desertion.

1. In proceedings brought by grandparents for the adoption of a minor grandchild, its mother, the daughter of petitioners, having received its custody upon being granted a divorce from its father, she consenting to such adoption, this court declines to interfere with a decree in conformity with the prayer of the petition.

2. The welfare of the child is of prime importance in such proceedings, and caprice, obstinacy or opposition, prompted by unworthy motives on the part of the non-consenting parent should not be regarded.

3. It seems that the granting of a divorce to a wife on the ground of desertion, together with the custody of her child, accompanied by the absence of all assistance to the child by its father, amounts to a continuance as to it, of the desertion of the mother and child, which began before the suit for divorce was brought.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Mr. W. W. GURLEY, for appellant.

Mr. JOHN M. HAMILTON, for appellees.

GARY, J. This is a proceeding under the act of February 27, 1874, Ch. 4, R. S., in relation to the adoption of children.

The child Edna is a girl who is about seven years of age, as the decree states, at the time it was entered, July 22, 1888. She is the daughter of the daughter of the petitioners. Though not expressly shown by the record, it is fairly inferable from it that the petitioners have all the comforts, and probably the luxuries of civilized life, and that the father of the child, he being the appellant here, has neither the one nor the other, for the helpless object of this proceeding. June 3, 1885, the parents of the child were separated by a decree of divorce, granted to the wife because of cruelty of the appellant. He had left mother and child, before the suit for divorce, in destitution, in a house provided for them by the father of the wife. The decree gave the custody of the child to the wife, and the appellant has done nothing for either of them since. Their home is with the petitioners. The mother of the child is delicate in health, and consents to the adoption with proper recitals of facts.

The welfare of the child is an important element in a proceeding of this character. The natural rights of the parents are not to be disregarded, but nothing is to be yielded to mere caprice or obstinacy, or to opposition prompted by any unworthy motives. Whether the decree of divorce, *ipso facto*, confers upon the wife, to whom it is granted, and to whose custody it commits the child, authority to consent to the adoption of, as it does to appoint a testamentary guardian for the child (*Wilkinson v. Deming*, 80 Ill. 342) or not, such a decree and custody, accompanied by the absence, on the part of the appellant, of all parental assistance or aid to the child, may well be held to make a sufficient case, that continues toward the child, the desertion of both mother and child, which begun before the suit for divorce was commenced. There is no reasonable presumption, in law or fact, that a woman, yet probably young, the daughter of living parents, has any independent pecuniary resources. The whole case shows that the only shelter for this tender infant is in the home and affections of her grandparents, and to that haven of rest the decree properly committed her.

Decree affirmed.

City of Chicago v. Morse.

CITY OF CHICAGO
v.
ALBERT W. MORSE.

33	61
69	106
33	61
70	109
33	61
86	646

Municipal Corporations—Negligence—Personal Injuries—Defective Streets—Evidence—Instructions.

1. Whether or not a certain course of conduct is negligence is for the jury.
2. In an action to recover from a municipality for a personal injury alleged to have been occasioned by a defective street, this court holds as erroneous an instruction given in behalf of plaintiff, the same containing no reference to the evidence, and setting forth in effect that a traveler upon the streets of a city need not exercise ordinary care.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

MESSRS. HEMPSTEAD WASHBURN and THEODORE BRENTANO, for appellant.

MESSRS. WEART & WEART and J. S. McCLURE, for appellee.

GARY, J. By the testimony of the appellee it appears that on a pleasant afternoon, September 8, 1886, about two o'clock, he sat on the driver's seat of a laundry delivery wagon going south on Wabash avenue, a wide street paved with asphalt blocks, paying no attention to anything, and the horse that he had driven for thirteen or fourteen years drew the wagon into a hole, caused by repairs that were being made in the pavement. The result was the overturning of the wagon and breaking of the appellee's leg, and he wants the city to pay for it.

In such a case, if a verdict for him could be sustained at

all, it would be a prerequisite that the instructions, if any were given, not asked for by the city, should be free from all reasonable objection. The court of its own motion gave an instruction, telling the jury that if they believed certain facts the city was liable, without referring in any way to the evidence as the source of belief. *Freeport v. Isbell*, 83 Ill. 440, and *Faine Ins. Co. v. Mann*, 4 Ill. App. 485, and cases cited there, show that such an instruction may or may not be overlooked as the merits of the case may appear; and in this case the defect may perhaps be considered cured by a clause added to one of the instructions asked by the city, "that their verdict must be given upon the evidence." "The jury are instructed, as a matter of law, that any person traveling upon a street of a city which is in constant use by the public, has a right, when using the same with due diligence and care, to presume, and act upon the presumption, that it is reasonably safe for ordinary travel throughout its entire width, and free from all dangerous holes, obstructions or other defects," is the first instruction given on the part of the appellee.

There is in this no reference to the evidence, and when the jury are told that appellee "has a right * * * to presume and act upon the presumption that a street is reasonably safe for ordinary travel throughout its entire width," it in effect informs the jury that a traveler upon a street in this city need take no heed to his ways.

At the best the clause, "when using the same with due diligence and care," serves only to instruct the jury that acting upon the presumption of safety is not inconsistent with due care. It is for a jury to say what action is or is not, consistent with due care; or, in other words, what course of conduct is or is not negligence. *Penn. Co. v. Frana*, 112 Ill. 398; *Myers v. I. & St. L. Ry.*, 113 Ill. 386. The judgment must be reversed and the cause remanded.

Reversed and remanded.

Merritt v. Merritt.

D. THEODORE MERRITT

V.

PHILANDER G. MERRITT ET AL.

Mortgages—Foreclosure—Practice—Dismissal—Reinstatement—Limitations.

1. A cause can not be reinstated after the term during which it was dismissed has passed, unless under such circumstances as, on a bill filed for that purpose, would, upon rules established, warrant a bill to set aside an ordinary decree after it has become final.

2. There can be no foreclosure of a mortgage where original proceedings to that end were dismissed for want of prosecution, and the mortgage note is barred by the statute when the new bill is filed.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Messrs. MASON BROTHERS and Mr. HENRY B. MASON, for appellant.

Mr. JOSEPH N. BARKER, for appellees.

GARY, J. June 24, 1887, there was pending, and had been for nearly five years on the chancery side of the Circuit Court, a foreclosure suit of the above title, in which, after it had been put at issue, nothing had been done. The parties are relatives and the suit involved a family quarrel. The respective solicitors had occasionally talked of bringing about a settlement, and occasionally about trying it some time. On the day mentioned the court called it for trial, nobody answered, though the solicitor of the appellees was present, and the court dismissed the suit. The solicitor of the appellant did not learn of the dismissal until August, and then the judge was gone and could not be reached until October. The solicitor of the appellees met the solicitor of the appellant immediately after

the dismissal, but said nothing to him about it, and said to a witness, that his reason for silence was in order to have the term of court elapse. There was some evidence as to the order of business in the office of appellant's solicitor, and the reason why the case was not attended to. There was no evidence of anything done to deceive the solicitor of the appellant, but only an avoidance of anything to put him on his guard. After the suit was dismissed and before the end of the time to which that term of the court may have continued, the statute of limitations barred the note secured by the mortgage. On these facts the appellant filed a new bill, asking the court to reinstate the case, or to foreclose the mortgage, and the court dismissed it for want of equity.

While the court in its discretion might, during the term at which the case was dismissed, have reinstated it, yet when the term had passed it was too late (*Kihlholz v. Wolff*, 8 Ill. App. 371, *Danforth v. Danforth*, 105 Ill. 603.), unless under such circumstances as, on a bill filed for that purpose, would, upon rules established, warrant a bill to set aside an ordinary decree after it has become final. But this is not such a case. *Wierich v. DeZoya*, 2 Gilm. 385; *United States v. Throckmorton*, 98 U. S. 61.

The other alternative of relief the appellant asks, upon the argument, that at law a new suit may be brought within one year after a non-suit, if the time limited for bringing the action expired while the suit was pending; that in this case that time expired during the time that the term of court at which this suit was dismissed might have continued, though such expiration was after the order of dismissal; that in law the whole term is to be considered as but one day; that during the term the order of dismissal might have been set aside, and was therefore not final until the expiration of the term; and that in some ways, as a conclusion from some combination of these postulates, the suit was still pending when the statute of limitations expired, and therefore a new bill is not barred by it. It would be of very dangerous consequence to hold that the suit was still pending during all the period during which the court might revoke its action.

Schmidt v. Hughes.

Suppose this mortgage not to have been recorded, and a purchaser of the premises *bona fide*, without notice, after the dismissal and during the time that the term of court might have continued; would he have been affected by the mortgage?

There is no case that answers the question, but in principle, though not in degree, it would seem to be like *Eldridge v. Walker*, 80 Ill. 270, where it is held that a purchaser, after a bill is dismissed by a decree on the merits, and before a writ of error is sued out, is not affected by the subsequent reversal of the decree. And see *Herrington v. McCollum*, 73 Ill. 476. The action of the court was not less final and operative as the end of the suit, by being revocable. There was therefore no suit pending when the time limited in the statute for suing on the note expired, and the note being barred, it is conceded no bill to foreclose would lie. *Emory v. Keighan*, 88 Ill. 482, is but one of theseveral cases in this State to that effect. Many other questions than those here discussed are suggested by this record, as to the solution of which no inference is to be drawn from this opinion.

Decree affirmed.

MATTHIAS SCHMIDT
v.
WILLIAM M. HUGHES.

Malicious Prosecution—Probable Cause—Larceny—Damages—Evidence.

It is proper in an action for malicious prosecution to admit evidence of damage suffered after the bringing of suit and before trial thereof.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon.
A. N. WATERMAN, Judge, presiding.

Mr. GEORGE F. WESTOVER, for appellant.

If appellant was justified in having a strong suspicion of appellee's guilt, he was justified in causing the arrest.

The Supreme Court of this State, in an early case (*Ross v. Innes*, 35 Ill. 487), defined probable cause to be "a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged." This definition was adopted in *Chapman v. Cawrey*, 50 Ill. 512; *Ames v. Snider*, 69 Ill. 376; *Palmer v. Richardson*, 70 Ill. 544; *Davie v. Wisher*, 72 Ill. 262.

In a later case the same court modified the definition somewhat, in these words: "Such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or entertain an honest and strong suspicion that the person accused is guilty." *Harpham v. Whitney*, 77 Ill. 32. The Appellate Court has recognized the modification, and has held that an instruction to the jury, stating the belief of a prosecutor must be based on facts sufficient to produce in the mind of the prosecutor a conviction of the guilt of the accused, is erroneous; that it is sufficient if the facts are such as to create in a reasonable mind a strong suspicion of guilt. *Keep v. Griggs*, 12 Ill. App. 511.

Defendant acted on information of facts sufficient even to convict.

Defendant missed lumber, and he was told by several persons that they saw plaintiff taking it. Defendant denies the taking. This alone was probable cause for the arrest.

In *Drogin v. Descalso*, 66 Cal. 415, it was held that where the defendant was informed by a child eleven years old that she saw the plaintiff stealing, it showed probable cause for the plaintiff's arrest; and where a third person told the defendant that he saw the stolen property in plaintiff's possession, it was held sufficient to constitute probable cause for the arrest of the plaintiff. *Beenar v. Dunlap*, 94 Pa. St. 329.

If the appellant had probable cause for making the charge against appellee, it matters not whether he also harbored mal-

Schmidt v. Hughes.

ice against him. *Leyenberger v. Paul*, 12 Ill. App. 635; *McFarland v. Washburn*, 14 Ill. App. 369; *Chapman v. Cawrey*, 50 Ill. 512; *Ames v. Snider*, 69 Ill. 376.

Mr. B. M. MUNN, for appellee.

Probable cause is a reasonable ground of suspicion supported by such circumstances as will warrant a reasonable and cautious man to believe the party guilty. *Ames v. Snider*, 69 Ill. 376; *Barrett v. Spaid*, 70 Ill. 408; *McDaid v. Bevins*, 85 Ill. 238.

The court and jury had the best opportunity to notice the conduct and bearing of appellant as he testified before them, and they could not believe that a man so furious, revengeful and mercenary could be possessed of reason or caution; much less could they believe that appellant caused the arrest in good faith. Mere good faith or belief is not sufficient; it must be a reasonable belief of a prudent man. *Bishop v. Bell*, 2 Ill. App. 551; *Ross v. Ennis*, 35 Ill. 487.

The proof in this case shows an absence of good faith, a want of prudence, and a neglect on the part of appellant to consult a reputable attorney as to what course to pursue. *Collins v. Hayte*, 50 Ill. 357; *Anderson v. Friend*, 71 Ill. 475.

To prove the want of probable cause we have both the positive and negative testimony of appellant himself: "I arrested Hughes because he would not pay me my demand of \$100." "I did it to get even with him."

And it was shown by his own testimony that he was actuated by indirect and improper motives. *Splane v. Byrne*, 9 Ill. App. 392.

GARNETT, P. J. The judgment of the court below is assailed because appellee, the plaintiff, was permitted to introduce evidence of damage which he claimed to have suffered after the suit was brought.

The action was for malicious prosecution, the declaration charging appellant with causing appellee's arrest on a charge of larceny. The evidence complained of tended to show that after the suit was commenced and before the trial the plaintiff

was unable, on account of the charge made against him by defendant, to procure steady employment, as he had formerly done, in his trade as plasterer and bricklayer. Sutherland, in his work on Damages, Vol. I, p. 187, says: "It is not essential, however, that all the injurious effects of the act which constitutes the cause of action, should have been developed and suffered before suit; it is immaterial to the right to recover for them, when the effects manifest themselves with reference to the time of bringing suit. * * * The actual effects done to the time of the trial are provable." See also Cooper v. Randall, 59 Ill. 321.

There was evidence tending to support the verdict on the material points of inquiry, and we fail to discover that it so decidedly preponderates in favor of the appellant on the question of probable cause, as to require interference by this court. There is no error and the judgment is affirmed.

Judgment affirmed.

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OSSIAN GUTHRIE ET AL.

v.

PATRICK DOUD.

Injunctions—Collection of Judgment—Injury to Real Property—Flowage—Evidence.

Upon a bill perpetually to enjoin the collection of a judgment for damages arising through the obstruction of a watercourse, the same being based upon the alleged perjury of certain witnesses, mistakes of others, and divers remarks and offers alleged to have been made by the plaintiff since the judgment, this court holds that the same should not be disturbed, the evidence in question having been presented and considered on the trial of the cause.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Mr. C. M. HARDY, for appellants.

Mr. F. W. BECKER, for appellee.

Assuming that the allegations of perjury are sufficient, it does not follow that a court of chancery will grant a new trial on that ground; for, as is said in *Woodside v. Morgan*, 92 Ill. 273, "Were a court of chancery to entertain bills for a new trial at law on the allegation of one party that the other had sworn falsely, the occasions would be numerous for applications of the present kind, under a practice where parties testify in their own cases, and their conflicting testimony on trials is so frequently witnessed;" or, as is said in *Fuller v. Little*, 69 Ill. 229, "Applications to a court of chancery for a new trial, after a verdict at law, are very rare in modern times, since courts of law exercise the same jurisdiction, and to the same liberal extent; and such trials are watched by equity with extreme jealousy."

It should appear in such an application that the applicant has been guilty of no *laches*, and that he had no opportunity of showing his defense in the proper forum and at the proper time. *Blackburn v. Bell*, 91 Ill. 434; *Yates v. Monroe et al.*, 13 Ill. 212.

As complainants knew of the alleged perjury before the termination of the last trial, they had abundant opportunity to make it known upon their motion for a new trial. If it was one of the grounds relied on for a new trial it is *res adjudicata*; for it was presented to a tribunal equally as competent to determine the question of perjury and render assistance as a court of equity; and if that tribunal passed upon it and its decision was affirmed by the Appellate and Supreme Courts, the decision is final. It can not be reviewed in equity, which does not sit as a court of errors. High on Inj., Sec. 130. If, on the other hand, the point was not made on the motion for a new trial, then the appellants were guilty of such *laches* as to preclude them now from raising the point; for a court of equity will never be called into activity to remedy the consequences of *laches*, of neglect, or the want of reasonable diligence. *Kersey v. Rush*, 3 Del. Ch. 339.

As to the perjurous testimony of the Douds, the bill is defective in not being supported by other oaths than those of complainants. Upon the trial there was the sworn statement of one party opposed to that of the other; there is no more than that now appearing in this case. Fuller v. Little, *supra*. The names of witnesses who would swear to the contrary should be given, and their affidavits as to what they would swear to on another trial should be annexed to the bill. Ibid.

The bill is further defective in showing no new evidence of a conclusive or decisive character; what it shows, if any, is merely cumulative. Woodside v. Morgan, 92 Ill. 273.

GARY, J. The record in this case shows that September 7, 1880, the appellee sued the appellants in the Superior Court for injuries to his property, which he alleged he had suffered from the obstruction by the appellants of a watercourse. That, after four trials, with varying results, the appellee obtained a judgment for \$1,200, which, after passing through all the courts to which the appellants could take it, stands affirmed. The present case is a bill in chancery filed by the appellants, asking that the collection of that judgment be forever enjoined, and for other relief.

There is an original bill and an amendment thereto, the original being based on allegations of perjury in the testimony of some witnesses, and mistake in that of others, and upon observations which the appellants have made since the judgment, as to the effect of the alleged obstructions upon the course of the water, and the amendment upon offers by the appellee, since the judgment, to sell his lands at high prices, inconsistent with his claim that it has been damaged. The allegations of the bill are minute, running into particulars as to the perjured or mistaken testimony to a length not consistent with the object of a judicial opinion to imitate.

That the appellants are not entitled to the relief they ask, is so firmly settled by authority, that it is difficult to feel impressed that the appellants have any hope of it. Even after one trial only, as to transitory matters, not physical features upon the face of the earth open to the observation of

Coughlin v. Gutta Percha & Rubber Mfg. Co.

every spectator who chooses to watch the phenomena, "the doctrine is well settled that the court (of chancery) will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed." *United States v. Throckmorton*, 98 U. S. 61. A great many cases are there cited, showing the application of the rule under a great variety of circumstances; among them are: *Smith v. Lowry*, 1 John. Ch. 320; *Tovey v. Young*, Pr. Ch. 192; *Bateman v. Willoe*, 1 Scho. & Lef. 201; *Greene v. Greene*, 2 Gray, 361. So in *Galena, etc., v. Ennor*, 116 Ill. 55, the Supreme Court of this State say: It can not be allowed as a ground for setting aside a judgment that there was false testimony given on the trial." P. 63. The doctrine is recognized and applied in *Brown v. Luehrs*, 95 Ill. 195, and there *Seward v. Cease*, 50 Ill. 231, which comes nearest to being an authority for appellants of any case, perhaps, in the books, is explained if not weakened.

¶ If this attempt was successful, why next year might not the appellee file his bill to set aside the decree upon this, alleging that such decree was obtained by perjury, and thus the parties alternate in their charges and counter charges without limit? No claim of originality is made on this query, as it is in some of the cases cited. The established law is against the appellants, and the decree dismissing the bill is affirmed.

Decree affirmed.

MICHAEL T. COUGHLIN ,

v.

THE GUTTA PERCHA & RUBBER MANUFACTURING
COMPANY.

*Sales—Labor Rendered—Compensation—Liquidation of Accounts—
Interest—Evidence.*

1. A creditor may bring suit for the recovery of money due and unpaid without waiting for the time to arrive when the debtor promises that payment shall be made.

2. Interest may be collected upon a balance ascertained to be due on a liquidation of accounts.

3. The term "liquidation" does not necessarily imply mutual accounts.

4. In an action brought to recover a sum claimed to be due for goods furnished and labor rendered, this court holds that a question involving the competency or admissibility of the testimony of the book-keeper of plaintiff in relation to the contents of the bill left with the defendant, to produce which no notice had been given, can not primarily be raised herein.

[Opinion filed April 17, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. CAMERON & HUGHES, for appellant.

Messrs. WILBER, ELDRIDGE & CLARK, for appellees.

The statute provides that interest shall be allowed on money due on the settlement of account from the day of liquidating accounts between the parties and ascertaining the balance.

This account was liquidated when it was presented to Mr. Coughlin for payment, and he agreed to pay the same.

"Where a debtor on the presentation of his account admits its correctness, and promises to pay the same, this will render it liquidated, and it will draw interest thereafter at the rate of six per cent. per annum." *Haight v. McVeagh*, 69 Ill. 624.

The Supreme Court of the United States, in construing the interest laws of Illinois, say:

"A sale of goods without a term of credit given is liquidated when contracted, and after the account is presented and impliedly admitted, the defendants are in default and chargeable with interest." *Cooper v. Coate*, 21 Wallace, 105.

Statements of the account between the parties had been sent to Coughlin, before the witness, Brown, presented one to him in person, and no objections were ever offered; this silence should be regarded as an acquiescence of the justness of the account, and it would be liquidated from that time. *Wiggins v. Burkham*, 19 Wallace, 129.

"A debt is liquidated when it is certain what is due, and how much is due." *Clark v. Dutton*, 69 Ill. 521.

Bessey v. Ruhland.

GARY, J. This was an action of assumpsit, upon the common counts, tried by the court without a jury.

The manager of the business of the appellee, in Chicago, testified that they had supplied the appellant with goods and done work for him. The bookkeeper testified that he presented to, and left with, the appellant a bill for the amount the appellee claimed, \$247, and that the appellant said he would pay it when he got his money from the county, which he thought would be in about fifteen days. No question was made in the case as to the competency, or admissibility of the testimony of the bookkeeper in relation to the contents of a bill left with the appellant, and to produce which no notice had been given, and no such question could now be made here.

The effect of the testimony of both witnesses put together is, that the parties had dealings with each other, and that the appellant acknowledged that, upon those dealings, he owed \$247. The appellees were under no obligation to wait the fifteen days for the payment of money due, and upon a balance ascertained to be due on a liquidation of accounts, the statute allows interest. It is not necessary that there be mutual accounts for liquidation. *Haight v. McVeagh*, 69 Ill. 624.

These views dispose of the points made by the appellant, and the judgment is affirmed.

Judgment affirmed.

G. BESSEY

v.

J. B. RUHLAND.

Practice—Appeals—Dismissal of—Preliminary Call—Justices—Sec. 68, Act of 1872—Reinstatement.

1. In the absence from the record of a rule of court warranting such action, an appeal should not be dismissed on a preliminary call.

33	73
51	338
51	506
33	73
55	231
33	73
70	50
33	73
72	338

2. This court holds the clause in Sec. 68, act of 1872, requiring a written appearance ten days before the term by the appellee, to apply only to appeals taken by filing a bond with the clerk, and not to those taken by filing a bond with the justice.

[Opinion filed April 17, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. ELBRIDGE HANEY, for appellant.

At the time the appeal was dismissed in this case, appellee Rubland had never filed his appearance. In *Lehman v. Freeman*, 86 Ill. 208, the court says: "As a general rule of practice, a party in court can not force his adversary to act until he himself is in a condition to be forced to proceed."

The *Singer Manufacturing Company v. May*, 86 Illinois, page 398, was an appeal from the justice of the peace, and the appeal was perfected before the justice. The court says at the bottom of page 400: "And the case appearing on the trial calendar, the presumption is that she must have entered her appearance to have it placed there, and, if so, that would be a sufficient appearance *if more than ten days before the term*. (The italics are ours.) And as the want of a proper appearance was assigned as one of the reasons for setting aside the verdict, and the bill of exceptions fails to show the appearance was not in time, we must presume it was, and the court acted properly in disallowing that as a ground for setting aside the verdict." See also *Hooper v. Smith*, 19 Illinois, page 53.

In the case of *McVey v. Huott*, 11 Ill. App. 203, the court says: "It will be observed that not only must the appearance of the appellee be entered in writing, but the paper by which such entry of appearance is made must be filed with the papers in the case; the design of these provisions is quite obvious. It is not merely to bring the appellee within the jurisdiction of the court, by a voluntary appearance, but also to place the evidence of such appearance on file, where

it will be seen and known by the other party, so that he, for at least ten days before the term, may have notice of the fact that the cause is in a condition to be forced to trial."

The court also holds, in this case, that the payment of the appearance fee is a condition precedent to the right of appellee to enter his appearance in the case. See also Norton v. Allen, 12 Ill. App. page 592; see also Odd Fellows Benevolent Society v. Alt, 12 Ill. App. page 570; The Chicago Dredging and Dock Company v. McCarty, 11 Ill. App. page 552; McMullen v. Graham, 6 Ill. App. page 239; Pratt v. Bryant, 2 Ill. App. 314. Section 68, Chap. 79, Justices, etc., Revised Statutes of Illinois, is as follows: "In case the appeal from the justice of the peace is perfected by filing the papers and transcript of judgment ten days before the commencement of the term of the court to which the appeal is taken, *the appearance of the appellee may be entered in writing and filed among the papers in the case; and if so entered ten days before the first day of the term of court, the case shall stand for trial at that term.*" That is the only law that authorizes the court to dismiss the appeal for want of prosecution; it prescribes what shall be done; that the appearance shall be in writing and filed among the papers; under that section *the appearance of the appellee must be in writing, and filed among the papers in the case;* and if so entered ten days before the first day of the term, the case shall stand for trial, etc. Until that has been done the court has no jurisdiction of the persons, and can not dispose of the case; this statute applies as well to appeals perfected before the justice, as to cases where the appeal is perfected in the court above.

Mr. D. M. KIRTON, for appellee.

GARY, J. This was an appeal to the Circuit Court, by the then defendant, now appellant, from a judgment of a justice of the peace, taken by filing the appeal bond with the justice. The appeal was taken December 1, 1882, but the papers were not filed in the Circuit Court until September 28, 1887. May

7, 1888, on a first or preliminary call, on motion of the appellee, and without any appearance in the case by the appellant, the appeal was dismissed, and costs and damages adjudged against the appellant. At the same term he moved the court to set aside the judgment and reinstate the case, which motion, after being continued, was denied at the July term. The appellant excepted and brings this appeal.

It is quite sufficient to sustain the error first assigned, "the court erred in dismissing the appeal on a preliminary or 'first call,'" to cite the cases *Killian v. Clark* and *Titley v. Kaehler*, 9 Ill. App. 426 and 537, which hold that unless the record shows some rule of court, such as received the sanction of the Supreme Court in *Hinkley v. Dean*, 104 Ill. 630, the action of the Circuit Court is erroneous. If the question were here an original one, my view of the law would be, that all presumptions are in favor of the correctness of the judgment of the Circuit Court, until the error is made to appear on the record, and that, as this court has judicial knowledge that such a rule, under the authority of the case last cited, would justify the action of the court, its existence would be presumed, unless the record showed the negative. *Teerney v. People*, 81 Ill. 411; *Herman v. Pardridge*, 79 Ill. 471; *Morton v. People*, 47 Ill. 468; *Reiman v. Ater*, 88 Ill. 299; *Schmidt v. Braley*, 112 Ill. 48.

But I do not regret finding that assignment of error thus sustained and that on the principle, *stare decisis*, they govern the present case. *Hopkins v. McCann*, 19 Ill. 113; *Frink v. Darst*, 14 Ill. 304. My reasons for being satisfied with the result are forcibly stated by Mr. Justice McAllister in the one, and Mr. Justice Bailey in the other of those cases in 9 Ill. App.

This opinion might end here with an order reversing the judgment, but the principal question made by the appellant and of most general interest, is upon Sec. 68 of the act of 1872, concerning justices. It is true that in *Hayward v. Ramsey*, 74 Ill. 372, the Supreme Court, as a ground for their decision that the appeal must be perfected ten days before the term, applied that part of this section which relates to

filing the papers and transcript ten days before the term, to appeals taken by filing the bond with the justice. In that case the appeal was taken before the justice, after the term had begun.

There is no statutory provision except in Sec. 68, and before 1861 there was none at all, by which the time when an appeal case shall or should get into the Circuit Court, to be in order for trial at any term, is or was fixed. In *Boyd v. Kocher*, 31 Ill. 295, before the adoption of the present Sec. 68, where the papers were filed during the term, though the appeal was taken before the justice six weeks before, it was held that it was rightly dismissed for want of prosecution, on motion of the appellee.

In *Allen v. Monmouth*, 37 Ill. 372, after the present Sec. 68 was in force, it was held that an appeal taken before the justice, which had been pending in the Circuit Court nearly a year and a half, but in which the appellee had never entered any appearance, been summoned, or anything been done as a substitute or equivalent for such appearance, was rightly dismissed when called in its order for trial, the appellant not being present to prosecute it. It is necessary to a full understanding of that case to get the facts from the briefs of counsel, but the decision is that the law applied in 31 Ill. in its application to this case in 37 Ill. was not changed. The opinion is not very clear, but Mr. Justice Breese would seem to have had in his mind the same point that Mr. Justice Walker decided in 74 Ill., that the law of 1861, now Sec. 68, "allows ten days for preparation for trial after the court has acquired jurisdiction of the parties." There is no case in which the clause of Sec. 68 relating to the appearance in writing by the appellee has been applied, either by the Supreme or Appellate Courts, to an appeal taken by filing a bond before the justice. It is a singular fact that until 1849, no mode was provided for getting the appellee into court, when the appeal bond was filed with the clerk, except by actual service of summons as now provided in Sec. 65.

The law of 1849 made the provision for two *nihils* as now in Sec. 67. Then came the law of 1861, now Sec. 68, allowing an appearance in writing, and the only purpose of that was, as

an alternative or substitute for the other modes of obtaining jurisdiction of the appellee, when the bond was filed with the clerk. The right of parties to proceed is reciprocal. Hooper v. Smith, 19 Ill. 53. (The report does not show that the appeal in this case was taken by filing the bond with the clerk, but Boyd v. Kocher, 31 Ill. 295, explains that it was taken under then Sec. 61, now 65.) It has never been supposed that on an appeal taken by filing a bond with the justice, the appellant could not proceed, whether the appellee ever came or not. Reiman v. Ater, 88 Ill. 299; Fix v. Quinn, 75 Ill. 232. And as in such case the appellee may be pushed, he may push.

There is, besides the decision in 37 Ill., the recognition or assumption of the rule that Sec. 68, so far as relates to a written appearance, does not apply to appeals taken by filing the bond with the justice, in Camp v. Hogan, 73 Ill. 228, and Burns v. Nichols, 89 Ill. 480, if not other cases, as in Singer v. May, 86 Ill. 398, and Hohmann v. Eiterman, 83 Ill. 92. In truth, both legislation and decisions are in a very unsatisfactory condition on this subject, but the rule of this court is, that the clause in Sec. 68 requiring a written appearance ten days before the term, by the appellee, only applies to appeals taken by filing a bond with the clerk, and does not apply to appeals taken by filing a bond with the justice.

Reversed and remanded.

CITY OF LAKE VIEW

v.

H. TATE.

33	78
41	71
33	78
146	68
33	78
60	398
61	378

Railroads—Municipal Ordinance—Rate of Speed—Discrimination in Favor of One of Several Roads.

1. A municipality may regulate by ordinance the rate of speed of railway trains within its limits.

2. Ordinances of this character must be reasonable and consistent with the laws and policy of the State, and must not be oppressive, unequal, or unjust, or partial or discriminating in their operation.

City of Lake View v. Tate.

3. The question of whether an ordinance is a just and reasonable exercise of the power reposed in the common council is a question of law for the court, upon consideration of the circumstances of a given case.

4. In an action to recover a penalty from an engineer for running a train through a municipality at a greater rate of speed than was allowable under one of its ordinances, this court holds that the ordinance in question in attempting to divide the city into two railroad districts, one for each of two roads, and to establish a lower rate of speed for one road than the other, was obnoxious to the objection that it attempted unjustly and oppressively to discriminate against such road, and declines to interfere with judgment for the defendant.

[Opinion filed April 17, 1889.]

APPEAL from the Criminal Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

Mr. HARVEY H. ANDERSON, for appellant.

Redfield, in his great work on the law of railways, pages 577-8, thus expresses himself:

"It has been held that a statute giving power to the common council of a city to regulate the running of cars within the corporate limits, authorizes the adoption of an ordinance entirely prohibiting the propelling of cars by steam through any part of the city. We should entertain no doubt of the right of the municipal authorities of a city, or large town, to adopt such an ordinance without any special legislative sanction, by virtue of the general supervision which they have over the police of their respective jurisdiction."

And Judge Dillon is strongly of this opinion. He says:

"Resulting from the power over streets, and to protect the safety of citizens, and their property, municipal corporations, in the absence of legislative restriction, may control the propelling of cars within their limits, and may prohibit the use of steam power." Dillon on Mun. Corp., Sec. 713.

Cooley says:

"Perhaps the most striking illustrations of the principle here stated will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject

to such new regulations as from time to time may be made by the State with a view to the public protection, health and safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter-contract, removed from the sphere of State regulation; and the charter implies an undertaking, on the part of the State, that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues." Cooley's Const. Lim. (5th Ed.) p. 575.

Coming now to decided cases, and confining the investigation to our own State reports, the power in the legislature to regulate railway operations in the most ample manner has been fully sustained.

In *C. B. & Q. Ry. Co. v. Haggerty*, 67 Ill. 113, the validity of a speed ordinance was in question. I now quote from the opinion: "It is contended that the ordinance is null and void, because the town had no authority to pass such an ordinance, and because the company was expressly authorized by law to fix and regulate the rate of speed of trains upon its road. There is no grant of power to this town, in express terms, to regulate the rate of speed of railway trains passing through the town, but by its charter (Pr. Laws 1857, pp. 540 and 541) the board of trustees of the town have the power to declare what shall be considered as nuisances, and to prevent and remove the same, and to regulate the police of the town, and to make such ordinances as the good of the inhabitants of the town may require. Under these powers we think the town possessed the authority so to order the use of private property within its limits as to prevent its proving dangerous to the safety of the persons and property of citizens; and we view the ordinance in question as but a police regulation for the preservation of the safety of persons and property, the adoption of which was no more than a fair exercise of the police power vested in the town. Nor has the railway com-

pany any just ground of complaint that the regulation interfered with the powers conferred upon it in its act of incorporation or by any other law of the State. In the exercise of the privileges so conferred upon it, the company is as much subject to the police laws of the State as an individual pursuing his business."

This view is confirmed in the *North-Western Fertilizing Company v. Hyde Park*, 70 Ill., page 646. The court say:

"It is urged that railroads in cities and towns are nuisances, but they are only exercising their franchises in thus operating them. If this be true, and we doubt not they may be so operated as to make them such, still the General Assembly has, in numerous instances, long after their charters were granted and the roads were constructed, enacted laws regulating the speed of trains in cities and towns, or conferred the power on such municipalities to do the same thing, and thus prevent the roads from becoming a nuisance; nor are we aware that this salutary exercise of the police power has ever been challenged. Its justness and even necessity, have commended it to all, and it has not been questioned; and this is a fair illustration of the exercise of the police power over bodies corporate. It is on the same principle that railroads are required to fence their tracks, sound a whistle or ring a bell at highway crossings, and to come to a full stop before a train crosses another railroad. These, and many other duties are imposed as being necessary for the safety of the people and their property, and grow out of the implied power that the General Assembly may restrain these bodies, to promote the safety of community as it may individuals."

In the case of the *Illinois Central Railroad Company v. Willenborg*, reported in 117 Ill. page 203, the company endeavored to restrain the defendants from constructing, under Secs. 51 and 52, Chap. 114, of the Revised Statutes, a private crossing over its tracks at a certain point indicated.

This is a very instructive case, and I quote liberally from the opinion, and sufficient to enable the court to understand the point made, and the decision rendered, and the reasons therefor:

"The point is made, however, that these provisions are not obligatory on this corporation, because they were enacted many years since it received its charter from the State. This is a misapprehension of the law. The regulations in regard to fencing railroad tracks, and the construction of farm crossings for the use of adjoining land owners, are police regulations in the strict sense of those terms, and apply with equal force to the corporations whose tracks are already built, as well as to those thereafter constructed. They have reference to the public security, both as to persons and to property.

"All property devoted to public uses takes on a nature or qualification *quasi* public, and is for that reason held to be subject to legislative control in a greater or less degree, and to which the mere private property of the citizens is not subjected. Rights purely and exclusively private, in no wise affecting others and in no way affecting public morals, are not regarded as being within the control of the police power; nor can mere private property be taken for public uses without making to the owner just compensation; yet the law has always required the citizen to so use his property as not unnecessarily to injure another, and to compel the observance of that rule, even private property may be brought within legislative control to that extent. But where property, whether belonging to a natural person or to a corporation, becomes 'affected with a public interest, it ceases to be *juris privati* only.' Where a party devotes his property to a public use, the community at large acquire such a qualified interest as will subject it to legislative control for the common welfare.

"Accordingly, the property of railroads, and other similar corporations transacting business for and with the public, has been subjected to burdens not imposed on the owners of mere private interests. The distinctions in this regard have been uniformly observed. It is for this reason it has been frequently held that railroad corporations, notwithstanding no such right had been reserved in their charters, may be required to fence their track, to put in cattle-guards, to place upon their engines a bell, and to do many other things for the protection of life and property. No public exigency has ever

made it necessary to impose such burdens on the citizen exercising no functions or occupations in their nature public or *quasi* public. Railroad companies are public corporations, in a limited sense, although the right of way, the road-bed, and the track thereon, are for the exclusive use of the owners, over which only their own conveyances are propelled. All others are excluded. The traffic, however, on railways, bears no analogy to our notions of travel on an ordinary or street highway. The uses are totally different and even inconsistent. The one is exclusive in favor of the owner, and the other is open and free to all.

“The common use of railroads by the public could not be otherwise than dangerous. It is for that reason their use is restricted to the owner. The fact railroad corporations are granted exclusive franchises to conduct a business in its nature public, must subject them to all reasonable control to secure the public safety and welfare. It is now the settled law, that railroad corporations are within the operation of all reasonable police regulations, otherwise there would be no security for the life or property of the citizen residing in the vicinity.”

Of the power of the legislature or any municipal council or board to adopt police regulations affecting only a portion of the territory over which such body has authority, there seems to be no doubt in this State.

Sub-section 46 of Sec. 32 of Chap. 24, R. S., authorizes city councils and villages to license, regulate and prohibit the selling or giving away of any intoxicating, malt, vinous, mixed or fermented liquor.

Sub-section 62 of the same section provides that the city council, for the purpose of guarding against the calamities of fire, shall have power to prescribe the limits within which wooden buildings shall not be erected or placed or repaired, etc.

Sub-section 81 of the same section authorizes the city council to direct the location and regulate the management and construction of packing-houses, renderies, tallow-chandleries, bone factories, soap factories, and tanneries, within the limits of the city.

Sub-section 82 authorizes the city council to direct the

location, and regulate the use and construction of breweries, distilleries, livery stables, blacksmith shops, and foundries within the limits of the city or village.

These provisions have all been sustained by numerous decisions of the Supreme Court of this State, which it would be a waste of space for me to quote.

In *The City of East St. Louis v. Wehrung*, 46 Ill. 394, the Supreme Court say:

"But an ordinance which merely discriminates between different localities in a city, according to the advantages they may present for the business for which license is sought, leaving all persons at equal liberty to apply for license in whatever locality they think proper, and making no distinction between persons, but between places only, is open to no objection."

Mr. EDWIN WALKER, for appellee.

The ordinance is void because it discriminates between the two competing railway lines, and indirectly confers upon one, the Chicago and North-Western, the advantage of permission to make quicker time, an advantage which is inestimable from a railroad's point of view. It subjects the defendant company to this great disadvantage without any reason or necessity.

The proof shows conclusively that while for a short distance along one portion of the Chicago and Evanston line, the southeastern part of the city of Lake View is somewhat more thickly settled than it is along the Chicago and North-Western, along the balance, more than two-thirds the entire distance, it is far less thickly settled than along any portion of the North-Western. The North-Western being by far the oldest road, population was naturally attracted all along the line, while the Chicago and Evanston having been built recently, passes through what is in many sections farming land and very sparsely settled. And even in the thickly populated portion of the city the evidence does not show such a preponderance of public travel across the Chicago and Evanston, over the North-Western, as to warrant the passage of any ordinance embracing only the territory through which

the company passes. The evidence further shows that at the crossings most frequented are gates and flagmen.

It will be noticed from testimony of plaintiff's witnesses as given in the abstract, that in all instances testified to and relied upon to show exceptional preponderance of travel over certain crossings of the defendant, there was a station of defendant company in the immediate vicinity, which occasioned the travel, and that the same was true near stations of the North-Western. Otherwise no marked difference was proven between the travel over the crossings of the Chicago and Evanston, and the travel over the crossings of the North-Western.

Ordinances, as well as statutes, which are partial, which directly or indirectly confer special favor or advantages on favored parties or individuals, and which are unjust and unreasonable, are unconstitutional and void. The general rule is stated by Cooley, Const. Lim., 393:

"Equality of rights, privileges and capacities unquestionably should be the aim of the law; and if special privileges are granted, or special burdens or restrictions enjoined in any case, it must be presumed that the legislature designed to depart as little as possible from this fundamental maxim of government. * * *

"Special privileges are always obnoxious, and discriminations against persons or classes are still more so, and, as a rule of construction, are always to be looked upon as probably not contemplated or designed."

The case of Tugman v. City of Chicago, 78 Ill. 405, involved the validity of an ordinance which prohibited the operation of any slaughter house "within the territory in the city of Chicago, bounded as follows, to wit: Fullerton avenue on the north, Thirty-fifth street on the south, Lake Michigan on the east and Western avenue on the west."

When the ordinance was passed several slaughter houses were in operation within the limits. The appellant, Tugman, erected and operated a slaughter house after the passage of the ordinance. The validity of the ordinance was contested on the grounds that it was unreasonable and oppressive. Of

the general principles involved in the case and which are applicable to the case at bar, the court say, page 407:

"Where power is conferred upon the legislative department of a municipal corporation to enact by-laws and ordinances for the better government of the inhabitants of the municipality, the body intrusted with that power, in its exercise, can not enact ordinances that are unreasonable, oppressive, or such as will create a monopoly." An ordinance, therefore, which would make an act done by one penal, and impose no penalty for the same act done, under like circumstances, upon another, could not be sanctioned or sustained, because it would be unjust and unreasonable. *Dillon, Municip. Corp., Sec. 256.* And the ordinance was held invalid on those grounds.

In *Sec. 253, Dillon on Municip. Corp.*, the general rule is laid down that all ordinances must be reasonable and consistent with the laws and policy of the State; and in *Sec. 254*, that they must not be oppressive.

Sec. 255 says: "Courts will declare void ordinances that are oppressive in their character."

Sec. 256: "Must be impartial, fair and general. As it would be unreasonable and unjust to make, under the same circumstances, an act done by one person penal, and if done by another not so, ordinances which have this effect can not be sustained. Special and unwarranted discrimination, or unjust or oppressive interference in particular cases, is not to be allowed. The powers vested in municipal corporations should, so far as practicable, be exercised by ordinances general in their nature and impartial in their administration."

And the validity of an ordinance is for the court, and not the jury, to determine.

Sec. 261: "Validity is for the court, and not the jury, to determine. Whether an ordinance be reasonable and consistent with the law or not, is a question for the court, and not the jury, and evidence to the latter on this subject is inadmissible. But in determining this question, the court will have regard to all the circumstances of the particular city or corporation, the objects to be attained, and the necessity which exists for the ordinance. Regulations proper for a

large and populous city might be absurd or oppressive in a small and sparsely populated town, or in the country. An unreasonable by-law is void."

In *T. W. & W. Ry. Co. v. City of Jacksonville*, 67 Ill. 37, an ordinance requiring a flagman at a certain crossing was held void as being oppressive and unreasonable, because unnecessary. Speaking of such regulations and ordinances the court on page 40 says:

"But such regulations must be what they purport to be, police regulations, and must be reasonable where applied to corporations or individuals. What are reasonable regulations and what are subjects of police powers, must necessarily be judicial questions."

The court said that the facts disclosed by the record showed no necessity for a flagman at that crossing, and arrived at the conclusion "that the ordinance under which it was sought to compel the railroad company to maintain a flagman at the point designated is not a reasonable requirement, and is therefore within the constitutional limitations on the exercise of police power."

In *Meyers v. C., R. I. & P. Ry.*, 57 Iowa, 555, the court held an ordinance limiting speed of railway to four miles an hour void as unreasonable. "Under the ordinance in question in this case, it would take three-quarters of an hour, after leaving the corporate limits of Council Bluffs, to pass over three miles of railroad, through agricultural lands fenced on both sides, and reach the inhabited portion of the city; and it would take over one hour and a quarter to reach the terminus of the railroad at the Union Pacific depot. One of the objects of a railroad is to secure quick transportation for freight and passengers. The ordinance in question not only places an unreasonable restriction upon the railways themselves, but it unreasonably and unnecessarily impedes the whole traveling public. No necessity has been shown and none certainly exists, for limiting railways to a speed of four miles an hour for three miles before they enter the inhabited portion of a city and while passing through agricultural lands fenced on both sides. If all the cities situated along the line

of the defendant's railroad between Council Bluffs and Chicago should enact a like ordinance it is apparent that the time between the two cities would be greatly increased. The ordinance acts as a restraint upon commerce, and, in our opinion, ought not to be sustained. The court did not err in refusing to hold the defendant liable for a violation of it."

The evidence in the case at bar has shown that the northern portion of Lake View through which the defendant's line passes is an unsettled country and no possible necessity exists for limiting speed of trains there.

MORAN, J. This was an action brought to recover a penalty against appellee, who was an engineer in the employ of the Chicago & Evanston Ry. Co., for running an engine and train of cars through the city of Lake View at a rate of speed forbidden by the ordinance of said city. On the trial in the Criminal Court the finding of the court was not guilty, and the city brings the appeal. The question presented, is the validity of the ordinance alleged to have been violated.

The city of Lake View extends along Lake Michigan north, for a distance of five miles from Fullerton avenue (which divides it from Chicago) to the line of the town of Evanston, and is bounded on the west by Western avenue. Ashland avenue, running north and south through Lake View, divides the territory comprising said city into two nearly equal parts. Two competing railroads run north and south through said Lake View, the C. & N. W. west of, and C. & E. east of Ashland avenue, both roads nearly parallel with said street, which is about midway between them.

The common council of the city of Lake View by ordinance divided the territory comprising the city into two railroad districts, the boundary line between said two districts being Ashland avenue, and each district being five miles long from north to south and about one mile wide. The ordinance provides that no railroad train, locomotive or engine, or car used for the transportation of passengers, shall be run through or within the limits of the "East Railroad District" as described, at a greater rate of speed than ten miles per hour, and

repeals ordinances which had theretofore been in force, which were general in their provisions, and regulated the speed of trains alike upon all railroads running through the city. The effect of this legislation was to regulate the speed of the C. & E. trains down to ten miles an hour, and leave the C. & N. W. trains to run at any rate of speed the operators of said road saw fit to adopt. The evidence shows that both railroads cross the streets of Lake View on a level with the surface of such streets, and that all things considered, by the operation of the roads at an equal speed of trains, about as much inconvenience and danger will be caused by the one road as by the other, to residents of Lake View and the general public.

There can be no question as to the power of the common council of this municipality to regulate by ordinance the speed of trains upon railroads running through the territory over which it has control for the safety of the public, but such regulating ordinance must be reasonable and consistent with the laws and policy of the State, and must not be oppressive, unequal, or unjust, or partial and discriminating in its operation. *Dillon on Munic. Corp.*, Secs. 253-61.

The question of whether the ordinance is a just and reasonable exercise of the power reposed in the council or not, is a question of law to be determined by the court, upon consideration of all the circumstances, and if the ordinance tends to create a monopoly or makes an act done by one, penal, and imposes no penalty upon another for the same act done under like circumstances, it can not be sanctioned or sustained, because it is unjust and unreasonable. *Tugman v. City of Chicago*, 78 Ill. 407.

On consideration of the circumstances in this record, we are of opinion that the ordinance in question is obnoxious to the objection that it attempts unjustly and oppressively to discriminate against the C. & E. road, and in favor of its competitor in business.

No reason—at least no reason which is in our opinion at all sufficient—appears for dividing the territory as is done by this ordinance, into two districts, and regulating the speed of trains in one of said districts only.

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If the population in said district was dense, and in the other district sparse, a different question would be presented. Whatever the motive which dictated the legislation, the ordinance is one which can not receive the approval of this court, and the judgment of the Criminal Court will therefore be affirmed. *T. W. & W. Ry. v. City of Jacksonville*, 67 Ill. 37; *Meyers v. C. R. I. & P. Ry.*, 57 Ia. 555; *Cooley, Const. Lim.*, 393; *Yeck Wo v. Hopkins*, 118 U. S. 356.

Judgment affirmed.

THE CALLENDER INSULATING & WATERPROOFING
COMPANY

v.

ALPHEUS C. BADGER.

Negotiable Instruments—Note—Guaranty.

In an action against the guarantor of a promissory note, the consideration thereof being certain wire involved in another suit, lately decided herein, this court declines to interfere with judgment for the defendant.

[Opinion filed April 24, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon.
RICHARD W. CLIFFORD, Judge, presiding.

Messrs. ADAMS & HAMILTON, for appellant.

Messrs. GREGORY, BOOTH & HARLAN, for appellee.

GARY, J. This is a suit by the appellant against the appellee, as guarantor of a promissory note made by Sheridan S. Badger to the appellant, the consideration of which was some of the wire that was the subject of the litigation in the suit of this appellant against Sheridan S. Badger, lately decided here.

Barrett v. Lingle.

It is conceded that this case is governed by that, but there has been some delay, for the purpose of permitting that case to be reviewed by the Supreme Court, if the appellant would take it there.

As that course has not been taken the judgment in this case is affirmed.

Judgment affirmed.

GEORGE D. BARRETT AND EDWARD J. WHITEHEAD,
IMPLEADED, ETC.,
V.
REGINA LINGLE.

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Appeal—Bond—Action of Debt on—Forcible Detainer—Pleading.

In an action of debt upon a bond executed on an appeal taken from a judgment in behalf of plaintiff in an action of forcible detainer, a condition thereof being that certain rent then or to be due should be paid in case the judgment was affirmed or the appeal dismissed, this court holds that evidence as to the rental value of the premises in question was admissible notwithstanding the absence from the declaration of an averment of detention by defendant, the same being supplied by the plea of payment on his part, the evidence showing his possession at the time in question.

[Opinion filed May 8, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

MESSRS. WHITEHEAD & PICKARD, for appellants.

MESSRS. THOMAS DENT and R. P. BLANCHARD, for appellee.

GARNETT, P. J. Appellee sued appellants and Abel Housinger in an action of debt upon an appeal bond executed to appellee by defendants on an appeal taken by Housinger from a judgment in forcible detainer. The condition of the bond was that Housinger should prosecute his appeal with effect, and pay all rent then due or that might become due before

the termination of the suit, and all damages and loss that the plaintiff might sustain by reason of the withholding of the premises, and by reason of any injury done thereto during such withholding, together with all costs until the restitution of possession to the plaintiff, in case the judgment should be affirmed or the appeal dismissed.

The declaration alleges in due form that on the trial of the appeal, the plaintiff had judgment of restitution and for costs, but that Housinger has not paid the rent that became due before the final termination of the suit, or the damages or loss which the plaintiff sustained by reason of the withholding of the premises, and of the injury thereto during such withholding, or the costs. Evidence was offered on the trial to prove the rental value of the premises. Defendants objected thereto on the ground that there was no averment in the declaration of detention of the premises by Housinger. The objection was overruled and we think properly. The allegation omitted in the declaration was supplied by the plea of payment, which impliedly admitted the withholding by Housinger. 1 Chitty on Pleadings, 671.

The evidence proved that Housinger was in possession of the premises during the time in question. The presumption is his possession was of the same character as it was at the time of the judgment of restitution. There is no rule which warrants the hypothesis that during that time he was in by some agreement with the plaintiff made subsequently to the giving of the appeal bond. The judgment is affirmed.

Judgment affirmed.

GARY, J., took no part in this case.

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ANNA SCHMIDT

v.

MICHAEL BAUER ET AL.

Practice—Judgment by Confession—Entry of, in Term Time—In Vacation—Warrant of Attorney—Writ of Error—Bill of Exceptions.

Schmidt v. Bauer.

1. When a judgment by confession is entered in vacation before the clerk, the warrant of attorney becomes a part of the record by being filed, and no bill of exceptions is necessary.

2. When the judgment is entered in term time, it becomes a part of the record only by being made so by such bill.

3. When the absence of a bill of exceptions precludes this court from knowing what evidence was introduced in a given case, it will presume that it warranted the judgment which is shown by the record to be valid on its face.

[Opinion filed May 8, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. N. M. PLOTKE, for plaintiff in error.

Mr. FRANCIS LACKNER, for defendants in error.

MORAN, J. This writ of error brings up the record of a judgment entered in term by confession upon a warrant of attorney. It is contended that the warrant of attorney was joint, and did not authorize the confession of judgment against the plaintiff in error alone, and that the note introduced in evidence was not the same as the one declared on.

There is no bill of exceptions, and we have no means of knowing what evidence was introduced, but must presume that the evidence warranted the judgment which is shown by the record, and which is valid on its face. There is a copy of a note and warrant of attorney copied into the transcript but we can not regard it as in the case, because not made a part of the record by the bill of exceptions. When a judgment by confession is entered in vacation before the clerk, the warrant of attorney becomes a part of the record by being filed, and no bill of exceptions is necessary; but when the judgment is entered in term time, it will become a part of the record only by being made so by a bill of exceptions. *Waterman v. Caton*, 55 Ill. 94. There is nothing before us which affects the validity of the judgment, and the same will therefore be affirmed.

Judgment affirmed.

GARY, J., takes no part in deciding this case in this court.

THE CHICAGO CITY RAILWAY COMPANY

v.

FANNY YANCEY.

Master and Servant—Street Railway Company—Conductor—Negligence of—Premature Starting of Car—Personal Injuries—Damages—Evidence—Instructions.

One suffering from a personal injury caused by the negligence of another is entitled to damages up to the time of trial should the effects thereof continue so long, and thereafter, when the same are "imminent and sufficiently certain."

[Opinion filed May 8, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. GWYNN GARNETT, Judge, presiding.

Mr. C. M. HARDY, for plaintiff in error.

Messrs. ALLAN C. STORY and LOUIS WASHINGTON, for defendant in error.

GARY, J. There is no merit in this application to have the proceedings in the Superior Court reviewed.

The only testimony as to the accident was on the part of the defendant in error, plaintiff in the Superior Court. She testified and was corroborated, that, being a passenger on a car of the company, she attempted to alight from it, when the car had been stopped for that purpose, and while she was partly off, the car was started by the conductor, and she was thrown to the ground and hurt. On this evidence the brief consists of abuse of the witness, and a discussion on natural philosophy as to where would be the center of gravity of a woman alighting from a car.

The company on the trial admitted that the car was run by them, and yet the brief now says there is no proof of it. The criticism upon an instruction that the word "negligently" or

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"carelessly" is omitted where it should have been inserted, with reference to the act of the conductor in starting the car while she was getting off, is abstractly just. But that omission is utterly immaterial as to the merits of the case.

It is claimed that the jury should have been told that the defendant in error could have no damages except for injuries sustained before the suit was commenced. There was testimony as to permanent injury, and "the actual effects down to the time of the trial, are provable; and whether those that may ensue later may be taken into account, will depend whether they are imminent and sufficiently certain." 1 Sutherland on Damages, 187. The judgment is affirmed.

Judgment affirmed.

GEORGE W. DUMOND
v.
MERCHANTS NATIONAL BANK.

Banks—Deposits—Application of—Private Funds—Priority.

One bank is not liable to an individual for money delivered to it by a second bank, accompanied by a deposit ticket directing that the same be placed to the credit of a third bank, in the absence of notice that the funds in question belonged to such person.

[Opinion filed May 8, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. PECKHAM & BROWN, for appellant.

We assert that as this money was the plaintiff's, as it was deposited with the Merchants National Bank for the credit of the Exchange Bank of Earlville, as it was by the Exchange Bank of Earlville admitted to be plaintiff's and ordered turned over to him, and as it does not appear that, upon the faith of the

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deposit to the credit of said Exchange Bank and before notice of the plaintiff's rights, the Merchants National Bank had made any disbursements for said Exchange Bank or altered its position with relation to said Exchange Bank at all, the plaintiff can recover.

We are ready to admit that as to any disbursements for the Exchange Bank made in good faith by the Merchants Bank, on the credit of the deposit to the account of said Exchange Bank, the Merchants National Bank would be protected. But this protection would not extend to a mere appropriation of the money to an antecedent existing debt of the Exchange Bank to it, either before or after the notice, and much less can the Merchants National Bank defend itself from the plaintiff's claim without even pretending to show any disposition of the money, after it was deposited with it.

We cite *Van Alen v. American National Bank*, 52 N. Y. 1; *Pennell v. Deffell*, 4 De Gex, M. & G.; *Broderick v. Waltham Savings Bank*, 109 Mass. 149; *Merrill v. Bk. of Norfolk*, 19 Pickering, 32; *Burnett v. First National Bank of Cornnna*, 38 Michigan, 630; *Central Nat. Bank v. Conn. Mutual Life Ins. Co.*, 104 U. S. 54; *Solomon v. Nicholas*, 113 Ill. 351-7.

In *Van Alen v. Am. Nat. Bank*, where the court cites with approbation *Pennell v. Deffell*, the New York Court of Appeals lays down the rule that money deposited in his own name by A, which belongs to B, the deposit being intended for the benefit of B, is B's money, and not A's, (in the case at bar, the money of Dumond, and not that of the Exchange Bank) although the bank had no notice that it was not an ordinary deposit made by A, and B can enforce payment to himself, if the bank has given nothing on the faith of the deposit. Says the court in this case:

"The title of the plaintiff does not depend on whether the bank knew he had a title or not; that rested upon other facts. A notice to the bank might have prevented any transfer or the creation of a lien by the depositor, or prevented the bank from taking or acquiring such lien in good faith, but could not otherwise be necessary or important."

In *Broderick v. Waltham Savings Bank* the plaintiff, to

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avoid attachment, deposited his money in the name of Ellen Whalen. It was held that he could recover the balance remaining to the credit of the account, though Ellen Whalen refused to authorize payment to him.

In *Merrill v. The Bank of Norfolk*, the court say—treating of the right of the plaintiff in the case of a similar deposit to this, to recover :

“The plaintiff may follow the property, however it may change form or in whosoever hands it may be found, until his rights be divested by his own act or authority.”

In *Burnett v. The First National Bank of Cornnna*, one Raynale, who was agent for one Burnett, deposited money of Burnett's, without his knowledge, in the defendant bank. The bank did not know but that it was Raynale's own money, and after Raynale's death proceeded to appropriate the balance of it (a small portion having been checked out by Raynale in his lifetime), to an antecedent debt owed by Raynale to it. Suit was brought by Burnett's administrator (Burnett also having died) for the balance thus appropriated, no recovery being claimed of the amount which Raynale had checked out. The court say : “If decedent owned the proceeds of the bond * * * when Raynale made the deposit, the mere fact (if it is a fact) that the bank officers were ignorant of such ownership, or the mere fact of their formal transfer on the bank books of such proceeds to satisfy the debt due to the bank from Raynale (if there was such a debt), or both facts together, could not extinguish Burnett's right to recovery as to the fund left in the bank, if capable of being traced. Had it been actually shown that Raynale actually participated in and assented to the appropriation attempted by the bank, the latter being ignorant and without any reasonable notice of decedent's rights, there might be room for other considerations. But we are not aware of any principle which will enable a depository who has received from a trustee or agent a fund belonging in fact to the principal or beneficiary, to appropriate it by his sole act to his own debt held against the trustee or agent, and thereupon to insist that his want of knowledge of the true ownership is sufficient to guard such

inequitable appropriation and bar the real owner from pursuing the fund. On the contrary, the doctrine is well settled that the beneficiary or principal may in such cases follow and claim his own."

In all of the cases we have cited, the general principle for which we contend has been recognized, and a great number of others might be adduced for its support.

Mr. E. A. Otis, for appellee.

The counsel for the appellant concede at the outset that every point which is relied upon as ground of reversal, has been passed upon adversely in *Drovers National Bank v. O'Hare*, 119 Ill. 346, after full hearing by the Supreme Court of Illinois, whose decision upon a state of facts conceded to be identical, this court is asked to reverse.

The relation between a bank and its customer is simply that of debtor and creditor. 1 *Morse on Banking*, 3d Ed., Sec. 298.

In *Addison on Contracts*, Vol. 1, *p. 371, 8th Ed., the doctrine is laid down as follows: "In a banking account of the ordinary kind between a banker and his customers, it is not competent to any third person to interpose and say that the customer was his agent, and that the banker has contracted with such third party through the medium of such customer, his agent. All checks and money paid into the bank by the customer are, as between the banker and the customer, the checks and money of the customer, whoever may be the real owner of them. If the owner of the cash allows his agent to deal with it as his own, and pay it into the bank in his own name, he has no power over it after it has reached the banker's hands.

In *School Trustees v. Kirwin*, 25 Ill. 76, the court in a similar case use the following language:

"An important inquiry of a court of equity is, whether property, bound by a trust, has come into the hands of persons who are either bound to execute the trust or to preserve the property for the persons entitled to it. If the cases on this subject are adverted to, it will be found that trusts are en-

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forced, not only against those persons who are rightfully possessed of trust property, as trustees, but also against all persons who come into possession of the property bound by the trust, with notice of the trust; and whoever so comes into possession, is considered as bound with respect to that special property, to the execution of the trust.

"This court held this doctrine in the case of Norton et al. v. Hixon, *post*.

"It is not necessary, if the trusts be moneys, that the particular coin or kind of money, or the individual pieces, shall be identified, in order to pursue it, but its identity as a fund must be preserved so that it can be distinguished from all other money. * * * The means of ascertaining the identity of this fund having failed, by the money having been mixed and confounded in a general mass of property of the bank, of the same description, the right to pursue it must also fail."

The same doctrine is held in *Otis v. Gross*, 96 Ill. 612; *Phoenix Bank v. Risley*, 111 U.S. 125; *Marine Bank v. Rushmore*, 28 Ill. 463.

These authorities establish the position that the Merchants National Bank was not liable to the plaintiff in this case, entirely independent of the decision of the Supreme Court in *Drovers Bank v. O'Hare*. In any event, the trust fund could only be followed in equity, when the rights of all parties can be protected. The fact that the Earlville Bank, two days after its failure, while its assets were in the hands of a third person, presumably a trustee for its creditors, attempted to turn this deposit into a trust fund, cuts no figure in the case. It was apparently one of the common devices by which an insolvent debtor attempts to give priority to a favored creditor. The creditors of the Earlville Bank had the right to be consulted, and the Merchants National Bank had no right to give up this money without their consent. Whenever it is called upon to show the disposition made of this money, its answer will be satisfactory and sufficient, but the plaintiff has never placed himself in a position to require it. The plaintiff's remedy, by suit against the Stock Yards Bank direct, was plainly pointed out to him by the decision of the Supreme

Court in the Drovers Bank case, and the records of this court, in that "other case," vaguely referred to by counsel in their brief, show that he promptly availed himself of it. The fact that this appeal is prosecuted by counsel for the Stock Yards Bank, indicates very clearly that it is the real party of record, masquerading under the plaintiff's name.

MORAN, J. On December 18, 1884, the firm of Ed Brown & Tipton deposited in the Union Stock Yards National Bank \$1,182.30, with a deposit ticket as follows: "Deposited with Merchants National Bank of Chicago, Illinois, to the credit of Exchange Bank, Earlville, Illinois, by Ed Brown & Tipton for the use of George W. Dumond, \$1,182.30.

"Date December 18, 1884."

On the same day the Union Stock Yards National Bank delivered to the Merchants National a check for a large sum, which was paid through the clearing house on December 20th. This check was accompanied by the deposit ticket, which showed that \$1,182.30 of the sum included in the check was for account of the Exchange National Bank, Earlville, Ill., but it was not stated that it was for the use of appellant. On December 20th, appellant presented to the Merchants National Bank the following letter from the Exchange Bank of Earlville:

"EXCHANGE BANK,
WILLIAM WILSON & Co., }

EARLVILLE, ILL., Dec. 30, 188-.

JOHN C. NELLY, Esq., Cashier.

Dear Sir:—Deposit of eleven hundred and eighty-two and 30-100 dollars by Stock Yards National for use of G. W. Dumond, we can not receive, as we had closed our doors before it reached you. You will therefore deliver to him the amount, his signature is here (G. W. Dumond), or to his order.

Respectfully yours,

WILLIAM WILSON & Co."

The Merchants National Bank refused to pay the amount to Dumond, and this action is brought to recover it, as money had and received by the bank which belongs to Dumond, and which the bank ought not to retain.

Dumond v. Merchants Nat. Bank.

The same circumstances that have occurred in this case with reference to appellant's money, existed in *Drovers National Bank v. O'Hare*, 119 Ill. 646, as regarded the money of O'Hare. The Northwestern National Bank held the same position in relation to O'Hare in that transaction that appellee does to appellant in this one. In answer to the contention of counsel in that case, that the action should have been brought against the Northwestern National Bank, the Supreme Court gave the following expression:

"We are of opinion the suit was properly brought. The Northwestern National Bank had no notice whatever that the check of appellant represented money belonging to appellee, or that appellee was in any wise interested therein. It never consented to become his debtor, or to become the depositor of funds for his use, and received the money without notice that it was charged with such use. The check purported to transfer to the Northwestern National Bank, funds of the Henry Bank, going to general account to the credit of the Henry Bank by the Northwestern National Bank. There was no privity of contract between the Northwestern National Bank and appellee. The transfer was made to that bank without his authority or consent, nor did the Northwestern National Bank consent to act as trustee in respect of this money, for its transmission to the Henry Bank, for his use. No action would lie by appellee to recover of the Northwestern National Bank."

Counsel for appellant in this case contended that the question before the Supreme Court in the case in which the language quoted was used, was the liability of the *Drovers National Bank*, and not that of the Northwestern; and that what was said in the opinion on the latter question was merely *dictum*, and ought not to control this court on the question as now directly presented, and counsel have cited a number of cases which appear to give substantial and authoritative support to their contention that appellee is liable to appellant in an action for money had and received under the facts of this case. It may be that *Drovers Bank v. O'Hare* could have been decided without reference to the liability of the

Northwestern National Bank, but the question was made in the briefs of counsel, and received attention and consideration from the court, and whatever might be our view on the authorities, if the question was clearly open to us, we do not feel at liberty to disregard the clear expression of the Supreme Court, given advisedly on a question made in argument, though not necessary to the decision, as we might do in a case where the expression was inadvertent and uncalled for. We prefer to govern the action of this court by the opinion of the Supreme Court as expressed, and leave counsel to urge in that court the arguments which support their client's right to recover notwithstanding *Drovers National Bank v. O'Hare*. The judgment of the Supreme Court will be affirmed.

Judgment affirmed.

GARY, J., takes no part in deciding this case.

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THE UNION STOCK YARDS NATIONAL BANK

v.

GEORGE W. DUMOND.

Banks—Deposits—Acceptance of with Instructions—Identity—Failure to Preserve.

One bank is liable for a deposit with it to the credit of a second bank for the use of an individual, when it delivers the same to a third bank to be credited to such second bank, without giving notice of the rights of the person in question.

[Opinion filed May 8, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge presiding.

MESSRS. PECKHAM & BROWN, for plaintiff in error.

MR. FRANK J. CRAWFORD, for defendant in error.

GARNETT, P. J. The facts in this case are set out in the

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 Ettelsohn v. Kirkwood.

opinion of this court filed at this term in *Dumond v. Merchants National Bank*. On those facts the court below, in this suit of appellee against appellant, found the issues for appellee and rendered judgment accordingly.

The decision in *Drovers National Bank v. O'Hare*, 119 Ill. 646, we regard as controlling authority in this case. The fault of the Drovers Bank was in wrongfully delivering O'Hare's money to the Northwestern National Bank. Here the fault of the Stock Yards Bank was in depositing the money of Dumond with the Merchants National Bank, without preserving its identity in pursuance of instructions which were entirely plain. Having accepted the money with the instructions it should have pursued the course marked out for it.

If there is any substantial distinction between this case and the *Drovers Bank* case, we fail to perceive it.

Judgment affirmed.

GABY, J., took no part in this case.

 BENJAMIN J. ETTELSOHN

v.

CHARLES H. KIRKWOOD.

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Contracts—Written and Oral—Particulars—Bill of—Request by Counsel that Jurors Shall Note Items of Claim—Witnesses—Credibility of—Evidence.

1. A party to a written agreement freely entered into, can not deny the truth of the recitals therein.

2. An attorney in a cause should not, upon trial, request a juror to note down the items of his client's claim.

3. In an action by one of two creditors against the other to recover a balance claimed to be due under a written agreement entered into by them, evenly to divide the proceeds of such property of a common debtor as might come to the hand of either, this court, upon the ground that the credibility of the testimony was a question for the jury alone, declines to interfere with the verdict for the plaintiff.

[Opinion filed May 8, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MESSRS. KRAUS, MAYER & STEIN, for appellant.

MESSRS. DOOLITTLE & McKEY, for appellee.

GARY, J. These parties both had claims against one Emma Lesser who had been doing business in Ishpeming in northern Michigan and who had absconded. The appellee resided there, and the appellant in Chicago. The appellant went to Ishpeming, and as the result of negotiations between these parties a written agreement was made that they should share equally the proceeds of all property of Lesser which either of them could obtain, the appellant agreeing that \$1,000 for insurance should be considered as received by him. In a little time thereafter the appellant received \$1,500 or \$1,510 for goods of Lesser sold by appellant. He had before this suit paid to appellee \$750, and this suit was brought by appellee to recover the unpaid residue, according to the terms of their agreement.

The appellant sought to avoid the effect of the agreement by denying the truth of its recitals, which was not admissible, (*Wynkoop v. Cowing*, 21 Ill. 570), and by alleging a subsequent parol agreement that the appellee should share expenses, which he testified to having paid. Whether such an agreement was made, and if made, whether the appellant made any proof of the payment of any expenses which would be covered by it, were questions for the jury, in the presentation of which the appellant had greatly the advantage, as the evidence for the appellee, except the original agreement, was by depositions, while the appellant was present and testified before the jury.

The depositions contained testimony as to other claims of the appellee than for half of the money received or acknowledged by appellant under the original agreement. On the trial appellant testified in regard to such other claims. No bill of particulars of them was actually filed, until the argument of the case began. While the counsel for appellant

Belz v. Belz.

was making his argument, he asked a juror to put down on a slip of paper the items of the claims of the appellant so that the jury might remember them. To this he had no right. *Ind. & St. L. R. R. v. Miller*, 71 Ill. 463. The counsel for the appellee said there was no need of that, as the jury could take the bill of particulars of the appellant with them. After the jury retired the appellant wished his bill of particulars to go with them, and the appellee wanted his to go with it, to which appellant objecting, neither was sent, and appellant excepted. It can hardly be expected that this court should hold that fair and equal treatment in the Circuit Court, is error in this. The jury rejected both bills of particulars, and found for the appellee the amount unpaid of the money due under the original agreement. In so doing they may have been influenced by the attempt of the appellant to obtain, before them, an unfair advantage, but whatever may have been the motive, the credibility of testimony was for their consideration.

There is no error and the judgment is affirmed.

Judgment affirmed.

FRANK BELZ

v.

GRETCHEN BELZ.

Divorce—Desertion—Summons—Service of Default—Collusion.

This court affirms a decree dismissing a bill for divorce, upon the ground of collusion.

[Opinion filed May 8, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

MESSRS. GOLDZIER & RODGERS, for appellant.

No appearance for appellee.

GARNETT, P. J. The bill for divorce in this case was filed by appellant against appellee on the 15th day of December, 1888, and alleged, as ground for the relief prayed, that the defendant deserted complainant on March 24, 1885, and had ever since that time, without cause or provocation, refused to live with him. The summons was issued and served the same day on the defendant while she was in the office of the solicitor who filed the bill. On the same day she, by a writing signed by her, authorized another solicitor to appear in the cause for her, waive her right to answer the bill and consent to a default. That paper was filed in the cause on the 18th day of December, 1888, and at the same time the solicitor, so authorized, entered her appearance, waived her right to answer and consented to a default. In pursuance of the consent so given, the bill was taken as confessed by the defendant on the day last named. The cause came on to be heard January 5, 1889, on proofs produced in behalf of the complainant only. It appeared from the testimony of complainant, that about three weeks before the hearing, he and defendant had an interview, and he told her he had filed a bill for divorce, to which she replied "all right." The judge by whom the case was heard interrogated him, and he answered as follows:

Q. "Did your lawyers tell you anything about your wife's entering her appearance in this case?"

A. "No, sir; I didn't know that she did."

Q. "Did he tell you that she signed that paper?"

A. "Yes, sir."

Q. "He told you about that, did he?"

A. "Yes, sir."

Q. "Did he tell you how he got it?"

A. "Yes, sir."

Q. "What did he say?"

A. "He said that my wife had spoken to him about it."

Q. "What did he say she said?"

A. "That she had spoken to him about it. He told me that my wife said that she wanted her divorce from me."

The judge called the complainant's solicitor as a witness, and from his testimony, it appeared that before the filing of

the bill in this case, appellee applied to him and requested him to secure a divorce for her, at the same time presenting a paper signed by her husband authorizing her to get a divorce. After hearing her statement he told her that she could not get a divorce, as she had no ground for it, and if there was to be a separation, her husband would have to ask for it. Proceeding, the witness said: "She then sent her husband to me. I had a talk with her husband, and found that he had good grounds for a divorce, and, consequently, I filed the bill for a divorce for him. * * * I don't really know whether I sent for her, or whether she came of her own accord." The court dismissed the bill, the order being in form the usual order dismissing for want of equity. The real ground, however, for the action of the court, was the apparent collusion between the complainant and defendant. The first arrangement they entered into was that the wife should file the bill, and the husband, so far as he could make the proceedings effectual, sought to accomplish the desired end by giving her written authority for that purpose. Why the wife was chosen as the moving party when she had, as now claimed, no cause of complaint, is known only to the persons interested. So long as she was intended as the ostensible complainant, they were evidently of one mind, both actually seeking the same end. The change of front which made him take the place was not followed by any adverse action on her part, or even by merely passive acquiescence. She directed him to the solicitor's office. She was served with process in the office of the same solicitor on the day the bill was filed, and was probably waiting there for that purpose. She immediately executed a written authority for the entry of her appearance, and for an immediate default by consent.

In the usual course the default could not have been taken until the 23d of January, but by the accommodating assistance of the defendant the cause was actually heard eighteen days earlier than that. We are of opinion that the evidence warranted the court in finding that there was collusion or conspiracy between the complainant and defendant for the purpose of procuring a divorce. In such cases the law conclu-

sively presumes that a good defense might have been presented, if there had been no collusive action. What proof was made as to the fact of desertion, was of no consequence. Desertion is sometimes justified under the law, and is often made to appear as desertion when, in fact, the separation was by agreement. But it is needless to speculate as to what defense could have been shown, as the wise policy of the law denies relief where collusion is proven.

In his work on Marriage and Divorce, Sec. 28a, Bishop says: "Collusion is equally possible in a good case, though it is less frequently practiced, the temptation being wanting. For, however just a cause in itself may be, if parties corruptly collude in the management of it before the tribunal, so that in reality both are plaintiffs, while by the record the one appears as plaintiff, and the other as defendant, this, in reason, and it is believed also in authority, will, as collusion, bar the proceeding."

Hamilton v. Hamilton, 89 Ill. 349, was a suit in assumpsit brought by a divorced wife against her former husband, on a contract made between them pending a suit by her against him for divorce. By the terms of the contract he agreed to give her a certain farm and \$500 in addition, and in consideration thereof she agreed to unite with him in the conveyance of all of his other real estate, waiving her homestead and dower rights; she further agreed to dissolve the injunction issued against him in the divorce suit, and to dismiss her claim for alimony in that suit. The court said that the contract was "in its essence and character against public policy, and that it must be held invalid upon that ground. While divorces are authorized by law, they ought not to be encouraged. In this contract there is no express agreement that the husband would not resist the application for a divorce or that he would consent to a divorce, still it is thought that to permit such a contract as this to be enforced in the courts, would open the door for the attainment of divorces by collusion." If that contract had been brought to the notice of the court on the hearing of the divorce suit between those parties, and no other proof made on the subject of collusion,

Schmidt v. Thomas.

what would have been the duty of the court? A dismissal of the bill would necessarily have followed.

A similar case is *Danforth v. Danforth*, 105 Ill. 603, where the court said: "It is conceded and such is the unquestioned law, that if there is an agreement in a divorce case that the defendant will not defend against a decree, or the parties collude to obtain a divorce, or so as to produce that result, the relief will not be granted. It is upon the principle that the parties do not have the only interest, but the public also has an interest in the marriage relation and in its proper maintenance; and the courts have ever been vigilant in preventing divorces from being obtained by fraud or collusion of the parties. * * * The effect of this agreement must have been precisely the same as had appellant and appellee agreed that she would do nothing to prevent him from obtaining a divorce, and, if necessary, she would assist for the purpose. It is not the mere form of words, but it is the intent—the thing or purpose intended to be accomplished—that constitutes the agreement, when that can be determined from the instrument itself." The principle of these decisions is applicable to the case at bar. There was here a common design followed up by both parties with the intent that the desired result should be produced in one way or another. We have neither the disposition nor the right to depart from this settled rule. The decree of the Circuit Court is affirmed.

Decree affirmed.

MATHIAS SCHMIDT ET AL.

V.

EDWARD F. THOMAS.

88 109
153 423

Practice—Default—Motion to Set Aside—Circuit Court—Jurisdiction of—Pleading.

1. The Circuit Court can not grant a motion to set aside a default at a term subsequent to the one at which it was entered for any error of law apparent on the record.

2. The allegation as a ground for such motion that through "accident and mistake" the party making the same was prevented from presenting a meritorious defense, has no weight.

3. A declaration must state with certainty who are the parties to a given suit, and the same must be commenced and prosecuted in the proper Christian and surnames thereof.

4. Failure in this regard is cured by personal service, but not in the absence of appearance, where service is by publication.

5. Where a defendant personally served, fails to appear, a judgment by default is erroneous, when the name of the party in the process is such that the law does not recognize it as the name of an individual or corporation.

6. The abbreviation "Mrs." is not a name.

7. Where a case has been fully tried, errors which did no injury may be disregarded, if it appears that justice has been done.

[Opinion filed May 8, 1869.]

IN ERROR to the Circuit Court of Cook County ; the Hon.
RICHARD S. TUTHILL, Judge, presiding.

Mr. GEORGE F. WESTOVER, for plaintiffs in error.

The judgment below was erroneous and void, because no declaration was filed against the defendant as named in the writ of summons and as named in the judgment.

The precipe and the writ of summons issued August 6, 1888, described the defendants, against whom the writ was issued, as "Mathias Schmidt and Mrs. Schmidt." The return of the sheriff shows the summons was served on the "defendants Mathias Schmidt and Mrs. Schmidt," August 15, 1888.

A declaration was filed on the 4th of October, 1888, against "Mathias Schmidt and his wife, Mrs. Harriet C. Schmidt, whose other name is unknown to the plaintiff."

The declaration states a joint cause of action against Mathias Schmidt and Harriet C. Schmidt. The judgment was rendered against "the said defendants Mathias Schmidt and Mrs. Schmidt."

The person actually served with summons, and who joins Mathias Schmidt in the writ of error, is Catherine Schmidt, wife of Mathias Schmidt.

A judgment rendered against persons jointly liable is an entirety, and if void as to one defendant is void as to all.

Shuford v. Cain, 2 Abb. U. S. 302; Kitchen v. Hutchins, 44 Ga. 620; Commercial Bank v. Wilson, 14 Gr. Ch. 473; C. M. L. Ins. Co. v. Clover, 36 Mo. 392; Holbrook v. Murray, 5 Wend. 561.

Messrs. PATTERSON & LANGWORTHY and JOHN MOFFITT, for defendant in error.

GARY, J. The judgment complained of was by default and entered at the October term, 1888, and the motion to set it aside was made at the November term, 1888.

The Circuit Court could not grant the motion made at a term subsequent to the term at which the judgment was entered, for any error of law apparent on the record. Such a motion is by statute, (Sec. 66, Practice) a substitute for the common law writ of error *coram nobis*, on which the court could not correct its own error in law. 2 Tidd Pr. 1137, and notes; Knox v. Winsted Bk., 57 Ill. 330; Becker v. Santer, 89 Ill. 596; Lill v. Stookey, 72 Ill. 495.

The ground of the motion that by accident and mistake the plaintiffs in error were prevented from presenting a meritorious defense, is no ground for such a writ. Kilholz v. Wolff, 8 Ill. App. 371; Fix v. Quinn, 75 Ill. 232; Courson v. Hixon, 78 Ill. 339.

The summons named Mathias Schmidt and Mrs. Schmidt as defendants, and is returned as served upon them. The declaration is against Mathias Schmidt and his wife, Mrs. Harriet Schmidt, and the judgment is against Mathias Schmidt and Mrs. Schmidt. In this writ of error she is named Catherine Schmidt.

A body of pleading called a declaration, but in fact, consisting of two complete and formal declarations, is filed as one. It must be stated with certainty who are the parties to the suit, and actions to be properly brought, must be commenced and prosecuted in the proper Christian and surnames of the parties. 1 Chit. Pl. 256; Elbertson v. Richards, 42 N. J. Law, 69. If this rule is neglected, but there is personal service, a judgment by default is not void. Opinion of

Breese, J., in *Hammond v. People*, 32 Ill. 446; *Martin v. Barron*, 37 Mo. 301. Though if the service be by publication, and no appearance, the judgment may be wholly void. *Skelton v. Sackett*, 91 Mo. 377.

But if the defendant does not appear, though there be personal service, if the name of the parties in the process be such that the law does not recognize it as the name of an individual or corporation, a judgment by default is erroneous. *Day v. Cushman*, 1 Scam. 475; *Elberson v. Richards*, 42 N. J. Law. 69; *Revis v. Lamme*, 2 Mo. 206. It seems superfluous to cite authority that the abbreviation "Mrs." is not a name, yet it has been so decided. *Elberson v. Richards*, 42 N. J. Law 69,

In England, under the old practice, such a question as is here presented could never have arisen in a court of error, as there were no judgments by default for want of appearance. The defendant must have appeared or been outlawed, if the plaintiff pursued him to the full extent of the law (3 Bl. Comm. 280), and without such appearance, the plaintiff could not proceed with the action. 3 Ch. Gen. Pr. 141. But the court in which the proceedings originated, would on such a defect set aside the writ and put the plaintiff to a new suit. *Tomlin v. Preston*, 1 Ch. R. 397.

Where a case has been fully presented on both sides, errors which did not injure may be disregarded if it appears that justice has been done, but on a judgment by default, this court can have no information as to what the merits are, and can not be required to strain the rules of law to supply the omission of the parties. The judgment is reversed and the case remanded. The defendant in error may amend and the plaintiffs in error plead, and their respective rights be determined.

Reversed and remanded.

Poppers v. Wagner.

GEORGE S. POPPERS

v.

GEORGE F. WAGNER.

38	113
55	206
33	113
105	215

Master and Servants—Trespass—Tortious Act of Servants under Direction of Master—Removal of Personal Property from Dwelling—Evidence of Wife.

1. In an action against an employer for the alleged trespass of his servants in entering a dwelling and removing personal property therefrom, this court hold as erroneous the action of the trial court in allowing the wife of plaintiff to testify as to the circumstances attending such removal—her husband being absent at the time.

2. In the case presented, the acts of the wrongdoers were not “matters of business transactions, where the transactions were had and conducted by such married woman as the agent of her husband,” as laid down by the statute.

[Opinion filed May 8, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. THOMAS SHIRLEY, for appellant.

Messrs. GENTLEMAN & PURNELL, for appellee.

GARY, J. This was an action of trespass by the appellee against the appellant for an entry by, as alleged, servants of appellant, into the dwelling of appellee and taking his goods. The wife of the appellee was alone at the time the alleged trespassers came, and was, against the objection and over an exception taken by appellant, admitted as a competent witness, to testify to what then happened, upon the ground, apparently, that while she was in the control of the furniture, in the absence of her husband, the acts of wrongdoers in her presence affecting the furniture, were, in the language of the statute, “matters of business transactions, where the transactions were had and conducted by such married woman as the agent of her husband.”

This was error. She, as agent, conducted no business. Being a spectator conferred upon her no more the character of an agent, as to the acts she witnessed, than it would have done upon any other spectator, and the control of the furniture by her in the absence of her husband, was a circumstance wholly extrinsic to, and independent of, the acts of the alleged trespassers. The acts were not a transaction had and conducted by her. *East St. Louis v. O'Flynn*, 19 Ill. App. 64; *White v. Chancy*, 20 Mo. App. 389; *Baxter v. B. & W. R. R.*, 102 Mass. 353. The judgment must be reversed and the cause remanded.

Reversed and remanded.

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64 543

CHICAGO & NORTHWESTERN RAILWAY COMPANY

v.

JOSEPH DRAKE.

Railroads—Personal Injury—Passengers—Negligent Starting of Train—Intoxication—Evidence—Instructions.

1. The conduct of a man, drunk or sober, at the time of a given transaction, is the subject of investigation, and if it was characterized by a proper degree of care and prudence, whether he made more or less effort to pursue that line of conduct is immaterial.

2. Total inattention to a passenger getting on in the dark, and starting a train while, with ordinary care, he is attempting to get on, when the circumstances are such as constitute an invitation to the passenger to make the attempt, render the company responsible for the consequences.

3. In an action against a railroad company to recover damages for injuries alleged to have been caused through the negligent starting of one of its trains, this court declines to interfere with the verdict for the plaintiff.

[Opinion filed May 8, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. W. C. GOUDY and W. B. KEEP, for appellant.

Messrs. JAMES McGRATH and D. P. HENDRICKS, for appellee.

GARY, J. Except as to the sufficiency of the evidence to justify the verdict, the only question presented by the brief of the appellants is upon the refusal of this instruction:

“The jury are instructed, as a matter of law applicable to this case, that if they believe from all the evidence in the case, that the plaintiff, at the time of the injury complained of, was intoxicated, that that fact is not an excuse for his not exercising due care and prudence for his own safety, but of itself makes it incumbent upon him to exercise great care and prudence when he places himself in a place of danger.”

No argument is made or authority cited that a man intoxicated is required to exercise a greater degree of care and prudence than a sober one should do. The conduct of the man, drunk or sober, at the time of the transaction, is the subject of investigation, and if that conduct is characterized by a proper degree of care and prudence, whether the man makes more or less effort to pursue that line of conduct is immaterial.

On the evidence the facts which the preponderance of it tends to prove, are, that May 5, 1885, at 10:40 P. M., a train of appellant was due, and arrived from the north at Rosehill Station, a few miles north of Chicago; the train made the usual stop, at the usual place; the platform is a very long one; the night was dark and wet; the station house was shut, and both house and platform unlighted; no conductor or brakeman took any notice whether any passenger left or took the train. The appellee had been waiting on the platform five to ten minutes for the train, and attempted to get upon it; immediately after the train started a jolt was felt, a signal to stop given, the train backed again, and then it was found that the right foot of appellant had been crushed by the train.

He testified not so explicitly on his direct examination as he did under the antagonism of the cross-examination, that after the train stopped, he attempted to step upon the car step, and while he was so doing, the train started and the jerk threw him off. If this was in fact the way the accident hap-

pened, and the appellee was exercising ordinary care in his attempt to get upon the train, the verdict is right. It was the duty of the company "to use all reasonable precaution for the safety of the traveling public." C. & A. R. R. Co. v. Wilson, 63 Ill. 167. Total inattention to a passenger getting on in the dark, and starting the train while, with ordinary care, he is attempting to get on, when the circumstances are such as constitute an invitation by the company to the passenger to make the attempt, make the company responsible for the consequences. There is some conflict in the testimony as to the condition of appellant as to sobriety. That matter was left to the jury under proper instruction.

A police sergeant testified that he saw the appellee attempt to get on the train, and that it was before the train stopped; that the train did not stop at the depot, but went about one hundred feet south; that it kept moving until after the accident; and then backed up one hundred feet or less. But he is so manifestly mistaken as to the movement of the train, and it is so clear that the train was stopped the second time, and backed up because of the jolt felt upon the train after it started from the first stop, that the jury were fully warranted in believing that he was mistaken also as to the movements of the appellee.

No cause is shown for reversing the judgment, and it is therefore affirmed.

Judgment affirmed.

ESTHER E. TAYLOR

v.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY.

Injunctions—Railroad Right of Way—Remedy at Law—Costs—Restitution.

Upon an appeal from an order dissolving an injunction, dismissing a bill for want of equity, and awarding a writ of restitution for premises taken possession of under cover of the injunction, the trial court finding that

Taylor v. L. S. & M. S. Ry. Co.

the same was improperly obtained for that purpose, this court enters a new decree, in lieu of, and as a substitute for the decree of the trial court, by modifying the same in so far as to dismiss the bill and cross-bill in the case without prejudice to the rights and remedies at law of either and both of the parties to the suit.

[Opinion filed May 8, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Messrs. BOOTH & BOOTH, for appellant.

The second assignment of error calls in question the decree dismissing the bill and cross-bill at costs of complainant in original bill.

It is true that the awarding of costs in equity cases is in the discretion of the chancellor, but a sound discretion must be exercised.

The appellee filed a cross-bill against appellant, which cross-bill the chancellor dismissed for want of equity, at costs of defendant (appellant) to said cross-bill. If there was no equity—no just ground for filing the cross-bill against appellant—why should *she* pay the costs? We think such a decree oversteps the discretion vested in a chancellor, and it ought not to stand. *Linton v. Quimby*, 57 Ill. 271; *Chapin v. Dake*, 57 Ill. 295.

Mr. PLINY B. SMITH, for appellee.

Where an injunction is obtained by deception or misrepresentation, the court will dissolve it. *High on Injunctions*, 1474.

In Illinois it is the law that where an injunction is the only relief sought, the court, on dissolving the injunction, will dismiss the bill. *Titus v. Mabee*, 25 Ill. 257; *Shaw v. Hill*, 67 Ill. 455; *Weaver v. Payer*, 70 Ill. 567; *Prout v. Lomer*, 79 Ill. 331.

Hence it follows in this case that, if the injunction should be dissolved, the bill should be dismissed.

The bill should be dismissed furthermore on the broad ground that its averments were proven to be not true.

The complainant was not and never had been the owner of the premises, and was not in possession until she took possession after the granting and under cover of the injunction, and inclosed the land with a fence. The defendant was not about to take possession of the land, but was in actual possession, and had had constructive possession since the time it first built its track.

Complainant's counsel make a distinction as to the consequences between the act of filing the bill and the act of procuring the order for the injunction. They say, in their brief, "the controversy turns on whether, at the time the bill was filed, the appellant or appellee was in possession," and allege that at the time the bill was filed the appellant had destroyed the fence and taken possession. It is undisputed, however, that the bill was drawn and sworn to and the order for the injunction procured before the fence was destroyed. The inference of counsel, therefore, seems to be that although the allegations of the bill were false when the bill was drawn and sworn to, and when presented to the court and the order for the injunction procured, yet, because in the interim the fence had been torn down, the averments of the bill were true when the bill was filed, and therefore the suit can be maintained. This proposition is not sound. The bill was before the court when the order for the injunction was granted, even though the bill was not filed until an hour later, and the inception of the proceedings must date from the time that the bill was presented to the court, even though counsel carried the bill in their pocket for some time thereafter before filing.

The purpose of a writ of injunction is to maintain the *status quo*, until the court can hear the case and make such order as a deliberate consideration of the case may require; and where a person procures a writ of injunction and thereby ties the hands of the opposing party, and then himself changes the *status*, the court will require the party so abusing its process to restore matters to their original condition; and in this case, it was the duty of the court to dismiss the bill and restore this property to the defendant. *Wangelin v. Goe*, 50 Ill. 459; *Herrington v. Herrington*, 11 Ill. App. 121; *Hawks v.*

Champion, Cary's Reports, 51; Dowche v. Berrot, Cary's Reports, 63; Hill v. Portmann, Cary's Reports, 140; Harbottle v. Pooley, 2 L. T. R. 436; Van Zandt v. The Argentine Mining Co., 2 McCreary, 642; Hate v. Lucia, 36 Wis. 355.

GARY, J. The appellant claimed as her own, a strip of ground twenty-five feet in width along the side of land which is the undisputed right of way of the appellee.

The appellee began, and perhaps finished, fencing it into their apparent right of way. The husband of the appellant, seeing the work in progress, procured the preparation of the bill in this case, swore to it and departed for the premises, several miles from the city. The solicitors of the appellant, having upon the bill so prepared, obtained an order for the injunction afterward issued, waiting until they felt assured that the husband had had time to tear down the fence of the railway, filed the bill and took out the writ, enjoining the railway from disturbing her. She has parted with her title *pendente lite*, and has now no interest in the premises. On these facts being shown the court dismissed her bill. Other circumstances in the case need not be noticed.

The decree of the court is right, except that the right of the parties at law should be left unaffected by it. It does not appear that the appellant asked that the dismissal should be without prejudice to her rights and remedies at law, nor is it now assigned as error that it was dismissed without such saving. In the brief, however, that matter is complained of, and *ex gratia* the decree of the Circuit Court is so modified that the bill of the appellant and the cross-bill of the appellee are both dismissed without prejudice to the respective rights and remedies of either and both of the parties at law, and a new decree, in lieu of, and as a substitute for, the decree of the Circuit Court will be here entered to that effect.

The appellees will recover from the appellant their costs in this court, except upon the cross-error assigned; those of the Circuit Court are provided for by that portion of the decree there not affected by the decree here. Restitution is not awarded, as she did not take possession under the process of the court.

Decree affirmed.

CHARLES P. PACKER ET AL.

v.

ELIZABETH PHILLIPS.

Attachment—Sureties—Action upon Bond—Costs.

1. In an action upon an attachment bond given in proceedings in aid of a pending action, this court holds, in view of the fact that the attachment was not of an original character, that the costs thereof are not recoverable herein.

2. Any damage covered by such bond is recoverable without having the same first assessed in an action for wrongfully suing out the attachment, notwithstanding the condition is to pay such damages as shall be awarded in any suit subsequently brought upon such ground.

[Opinion filed May 8, 1889.]

APPEAL from the Circuit Court of Cook County ; the Hon. FRANK BAKER, Judge, presiding.

MR. E. A. SHERBURNE, for appellants.

MR. JAMES B. GALLOWAY, for appellee.

GARY, J. This is an action upon an attachment bond, purporting to be executed by appellants as sureties for Mary J. Lewis, in an action by her against the appellee. The bond recites that Lewis had prayed an attachment, that the court ordered it, and that it was about to be issued, but there was no proof that it ever was issued, or that it could have done any harm to the appellee if it had been.

She recovered in this case what appeared to be the general costs of the action that Lewis prosecuted against her unsuccessfully. As the attachment prayed was not an original one, but in aid of a pending action, those costs were not covered by the bond. *Wallis v. Keeney*, 83 Ill. 370, and *Jevne v. Osgood*, 57 Ill. 340, are in principle the same as this case. If the appellee had sustained any damage covered by the bond,

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she might have recovered, without having her damages first assessed in an action for wrongfully suing out the attachment, notwithstanding the words of the condition are, to pay such damages as shall be awarded in any suit which may hereafter be brought for wrongfully suing out the attachment. *Churchill v. Abraham*, 22 Ill. 455.

There being no proof to warrant the finding, the judgment is reversed and the cause remanded.

Reversed and remanded.

FIRST NATIONAL BANK OF CHICAGO
v.
THE WILLIAM RUEHL BREWING COMPANY.

Negotiable Instruments—Check—Payment—New Trial—Newly Discovered Evidence.

In an action to recover the amount of a check this court declines to interfere with the judgment for the plaintiff, and holds that the trial court properly declined to grant a new trial upon the ground of newly discovered evidence, it appearing that the same is inconclusive and cumulative, and that the reasons adduced for its non-production upon trial are of an unsatisfactory nature.

[Opinion filed May 8, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. KRAUS, MAYER & STEIN, for appellant.

Messrs. SMITH & PENCE, for appellee.

MORAN, J. This was an action to recover the amount of check drawn on appellant and indorsed to appellee.

The drawer of the check, one B. J. Ettelsohn, stopped the payment of the check, and is the real defendant, and prosecutes this appeal in the name of appellant. The case was submitted to the court for trial without a jury and the defense was based on the claim that fraudulent representations were

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made to Ettelsohn as to the value of a certain saloon stock by which he was induced to advance to one Meyers the check in question as a part of a loan made on said saloon. The court found in favor of appellee, and thereupon a motion for new trial was interposed which was overruled and judgment entered on the finding. Afterward and at the same term of court another motion for new trial was made on the ground of newly discovered evidence, which was supported by affidavits of said Ettelsohn and two others. The court denied said motion.

The finding of the court at the trial is clearly supported by the evidence, and it is not contended that any error of law was committed. It is urged, however, that the last motion for new trial should have been allowed in order that appellant might have the benefit of the newly discovered evidence.

Before the order of a court overruling such motion will be reversed, it must appear from the record that the newly discovered evidence is not merely cumulative, but that it is controlling and conclusive, and that the party urging the new trial has not been negligent in not producing it at the trial.

We have carefully examined the affidavits in connection with the testimony given by Ettelsohn on the trial, and we are satisfied that no case for a new trial was made which comes up to the conditions above stated. The testimony of Ettelsohn given on the trial shows that he had knowledge of facts which would have led, upon very slight inquiry, to all he alleges he discovered after the trial, and the two new witnesses were known to him at the time of the trial, and it appears that they were present at the very conversation in which he claims that fraudulent representations were made to him, and the excuses presented by him for not having their testimony, are very tenuous and unsatisfactory. The evidence is also of a cumulative character, and by no means conclusive. It merely adds more testimony on one side of an issue heard at the trial, and upon a new trial the question would be as it was on the last one, who would the court believe?

The court did not err in overruling the motion for a new trial, and the judgment must be affirmed.

Judgment affirmed.

CHICAGO & NORTHWESTERN RAILWAY COMPANY
v.
FRED BOUCK.

Railroads—Personal Injury—Crossing—Ordinary Care—Obligation to Look and Listen—Special Finding—Evidence—Instructions.

1. In an action for damages for a personal injury, the ultimate facts of care or negligence are questions for the jury, and they should not be instructed by the court as to what acts constitute either.

2. No repetition by courts of review, that certain evidence does or does not sustain the verdict finding care or negligence in the particular case, make the conclusions of fact arrived at by such courts and the language in which they express such conclusions, doctrines of law for other cases.

3. A special verdict is a special finding of facts inconsistent with the general verdict that is to control it, and no question the answer to which can not have that effect can be material.

4. This court condemns the practice of requiring juries to find specially upon an unreasonable number of interrogatories.

[Opinion filed May 8, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Messrs. W. C. GOUDY and W. B. KEEP, for appellant.

Messrs. CAMERON & HUGHES, for appellee.

Counsel complain that the court, from twenty-eight questions proposed by appellant and a number submitted by us, (which they saw before the argument), should have selected nine for the consideration of the jury. Taking those asked by defendant below, Nos. 1, 10, 20, 21, 14 and 15, as they are arranged in this record, were given in Nos. 7, 2, 5, 6, 8 and 9, as sent to the jury. No. 9 as asked by the defendant was in substance identical, in form deficient, as compared with No. 1 submitted to the jury as prepared by us. Nos. 3 and 4 as given to the jury were presented by us to the defendant's counsel before argument, and were submitted by the court to

38	125
43	439
44	130
33	123
46	365
38	123
47	270
33	123
54	417
54	561
33	123
58	254
33	123
67	501

be passed on by the jury. So that appellant submitted twenty-eight questions to the court and the court required the jury to pass on seven of theirs, and gave two not asked by them. They were all that were material or pertinent to the controlling facts of the case.

We are not aware of any decision by our Supreme Court as to the number of special findings that may be required from a jury, but there must be a limit. The true rules to be applied to the number of those special questions would seem to be analogous to the rules laid down as to instructions. They are simple, plain and easy of comprehension.

It is proper to refuse an instruction essentially embraced in others already given. *T. W. & W. R. R Co. v. Maine*, 67 Ill. 298.

Instructions which single out a few of many circumstances of a case, and call special attention of the jury to their consideration are objectionable. *Hewett v. Johnson*, 72 Ill. 513; *Chittenden v. Evans*, 41 Ill. 251; *Protection Life Ins. Co. v. Dill*, 91 Ill. 174.

So of a fact which has no direct bearing on the real facts of the case. *Drohn v. Brewer*, 77 Ill. 280; *Hatch v. Marsh*, 71 Ill. 379.

They should, in a clear, concise and comprehensive manner, inform the jury as to what facts must be found to recover or bar a recovery. *Moshier v. Kitchell*, 87 Ill. 18.

Instructions, prolix, numerous, voluminous and containing an argument are improper. *R. Ins. Co. v. Nelson*, 75 Ill. 548; *S. Cemetery Ass'n v. Smith*, 24 Ill. 480.

Where the series of instructions given fairly cover the law of the case, a refusal to give a correct instruction, which could not have changed the result, will not reverse. *Cusick v. Campbell*, 68 Ill. 508.

Considering these rules and the statute as to such findings, the court here will see that the court below gave every one that applied to a material fact under issues as made by the pleadings.

It can not be that a jury, by their special findings, must settle every controverted fact. It is only material facts that

should be so settled. A fact may be controverted, and yet be immaterial in arriving at a just verdict.

In answer to the criticism on our instructions as given, we refer the court to *Garland v. C. & N. W. Ry. Co.*, 8 Ill. App. 571; *C. & W. D. Ry. Co. v. Klauber*, 9 Ill. App. 613; *Wabash Ry. Co. v. Henks*, 91 Ill. 496; *I. C. R. R. Co. v. Benton*, 69 Ill. 174.

GARY, J. This was an action to recover damages for personal injuries suffered by the appellee at a railroad crossing of a street in Chicago as stated in the brief of appellants. "The questions in this case arise upon the decisions of the court in refusing to require the special findings as requested by the defendant, in submitting certain questions to the jury, and in giving and refusing the instructions."

The questions actually submitted by the court to the jury are conceded to have been proper except this: "Was the plaintiff using ordinary care at the time of the injury complained of?" which, it is said in the brief, is more a question of law than of fact, and it is but a conclusion based upon other necessary facts to be proven in the case. But it is the settled law of this State that the ultimate facts of care or negligence are to be found by a jury, and the court is not to tell the jury what acts constitute either. *Penn. Co. v. Frana*, 112 Ill. 398; *Chi. & A. R. R. v. Pennell*, 94 Ill. 448; *Schmidt v. Chi. & N. W. Ry.*, 83 Ill. 405.

And no repetition by courts of review, that certain evidence does or does not, sustain the verdict finding care or negligence in the particular case, make the conclusions of fact arrived at by such courts and the language in which they express such conclusions, doctrines of law for other cases. *Fairbury v. Rogers*, 98 Ill. 554. Or even for a second trial of the same case. *Chicago & N. W. Ry. v. Moranda*, 108 Ill. 576. It is also objected that it is not made a part of the question whether the ordinary care was for the personal safety of the appellee; not that this omission makes the question erroneous, but useless. The appellants asked the court to submit to the jury twenty-eight questions. To do justice to their argument it is quoted as follows:

“A statute enacted by the legislature of 1887 provides that a jury, in any case in which they render a general verdict, may be required by the court, and must be required on the request of any party to the action, to find specially upon any material question or questions of fact which shall be stated to them in writing, which questions of fact shall be submitted by the parties requesting the same to the adverse party before the commencement of the argument to the jury. The statute provides that submitting or refusing to submit to the jury, when requested by a party as provided by the preceding section, may be excepted to and be reviewed on appeal by writ of error as a ruling on a question of law. The statute further provides that when the special finding of fact is inconsistent with the general verdict, the former shall control the latter and the court may render judgment accordingly. Laws of 1887, 185.

“The rule requiring a special verdict upon particular questions of fact exists in several other States. Its object is manifest. When a jury are permitted to render a general verdict without giving any reasons, the largest latitude is afforded for unjust verdicts. These provisions are intended as a restraint upon the passions and prejudices of the jury. It is therefore made the duty of the court, on the request of a party, to find specially upon any material question of fact, so as to restrain a jury from the dangers of influences which ought not to enter into their consideration. In order to give full effect to this statute, every question of fact material for reaching a conclusion as to a verdict for or against the plaintiff ought to be submitted to the jury. The more minute these questions, the greater protection there is to the rights of the parties.

“The only justification for a refusal of the court to submit any question proposed by a party as to any fact, is that such fact would be immaterial for the consideration of the jury. In such a case the evidence ought to be excluded. If the evidence is allowed to go to the jury at all, then the court ought to require an answer specific as to the fact, when requested in writing by the party. In the case at bar, where there was such conflicting evidence, and probably where some

of the witnesses were knowingly swearing to falsehoods, there was a peculiar propriety in presenting minute and numerous questions to the jury."

If the purpose of the statute be to catechise the jury, and require them to state the process of reasoning by which they have reached a verdict, it is a revolution. The whole ancient theory of trial by jury is gone. A jury is the only deliberative body that can reach a decision only by being unanimous. Supreme Courts decide by a majority, and judges who concur in the result, often differ as to the reasons. The Supreme Court of Wisconsin said ten years ago in *Ward v. Busack*, 46 Wis. 407, where, under a similar statute, only nineteen questions were put to the jury, "the presiding judge has the right in all cases to control the form of the special verdict, and no refusal on his part to submit a particular question for their answer would be a ground of error, unless the submission of such question is absolutely a necessary part of the special verdict so that the want of an answer to it would leave the verdict so imperfect that no judgment could be rendered thereon." They cite their statute, to which I have not access, and proceed: "From our knowledge of the nature of the special verdicts which have come under the consideration of this court, we believe we are justified in saying that the tendency of some of the profession, in making use of the law which requires that a special verdict shall be rendered whenever demanded, to abuse it by demanding that the jury shall answer an infinite series of questions, the object and tendency of which is to confuse, embarrass and confound the jury, instead of eliciting the facts upon which the right of the parties depend, needs the restraining hand of the judges presiding at the circuits, and that this court will take pleasure in sustaining such judges in every proper effort to make a special verdict a concise statement of the real facts at issue in the case." If this was their view in a case where nineteen questions were asked, what would they have said in such a case as the *A. T. & S. F. R. R. Co. v. Cone*, 37 Kansas, 567, cited by these appellants as authority in the *Dunleavy* case, last term, where one hundred and thirty-six were asked?

The learned judge of the District Court there told the jury, "The jury are not required to answer any special question, unless they can make such answer upon the testimony they have heard; if any question is submitted, and no sufficient evidence appears upon which to answer, the jury can say 'don't know' or 'can not answer on the evidence.' It would aggravate the tendency of this opinion to extend itself, to quote the questions in relation to which the Supreme Court of Kansas said, of course, the court committed error in instructing the jury that they might answer the special questions by simply saying 'don't know' or 'can not answer,' but if they had been truly and completely answered, the answers would almost have furnished specifications for building, and rules for running a train." Such an administration of the law is, unless the subject is too serious for the term, a farce.

A special verdict is, like pleading, a statement of facts, and not of the evidence, however cogent, of the facts. Starkie on Ev. 766. And the statute under consideration accords with this ancient doctrine. It is a special finding of facts, inconsistent with the general verdict, that is to control it, and no question, the answer to which can not have that effect, can be material. Ward v. Busack, 46 Wis. 407; 2 Thompson on Trials, Sec. 2681. The instructions fairly told the jury that to entitle the plaintiff to recover he must have been in the exercise of ordinary care, and if there could have been any lack of certainty as to what that care should relate to, at the instance of the appellants the court told the jury that before the appellee could recover he must show by *affirmative evidence* that he was, at the time he received the injury complained of, exercising ordinary care and prudence for his own safety; that it was his duty to *look and listen* before going upon the track; and in other particulars went farther than the law does in favor of the appellants, but refused to go the length they asked. There is no error in the record, and the judgment should be affirmed.

Judgment affirmed.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY
COMPANY

v.

WILLIAM CLOUGH.

Railroads—Personal Injury—Crossing—Special Interrogatories—New Trial—Evidence—Instructions—Pleading.

53	129
58	306
33	129
64	364

1. No direct statement that a railroad flagman knew of a fact which it was his duty to know, and by which fact his conduct, as he narrates it, was prompted, is necessary to justify a finding that he did know it.

2. Evidence which is merely cumulative but not conclusive, will not justify a new trial upon the ground of newly discovered evidence.

3. In an action against a railroad company to recover damages for injuries received at a street crossing, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed May 8, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. THOMAS F. WITHEW and JAMES C. HUTCHINS, for appellant.

Mr. JOSEPH S. KENNARD, JR., for appellee.

GARY, J. This was an action by the appellee for injuries sustained at a railroad crossing of a street.

A great mass of conflicting testimony was given upon the trial, and the verdict of the jury settles the facts both as to right to and the amount of the verdict. The first instruction on behalf of appellee is like the first one sanctioned by the Supreme Court in *Chicago & E. I. R. R. v. Holland*, 122 Ill. 461.

The special objection now made to this instruction is that the second count added to the original declaration is not

proved, and therefore an instruction referring to the whole declaration is wrong. The count alleges that the flagman of the appellants beckoned to the appellee to cross over when the flagman knew a train was coming. The appellee testified that the flagman did beckon him to cross over. Whether that was true or not the jury were to say. That the flagman knew the train was coming may well be presumed, as he was on the ground; it was part of his duty to watch for trains; and he testifies that he tried to keep the appellee out of the way of it. No direct statement that he knew the fact which it was his duty to know, and by which fact his conduct, as he narrates it, was prompted, was necessary to justify the finding that he did know it.

The appellants presented nineteen questions to be put to the jury, twelve of which were given to them to answer. The others were rejected, but the answer to no one of them, if such answer had been as the appellants wished it to be, would have determined that the appellee was not entitled to a verdict, and could not, therefore, have controlled it. In *C. & N. W. Ry. v. Bouck*, this term, this subject is sufficiently discussed. It is impossible, within any reasonable compass, to follow the counsel of appellants through many pages of brief, replying to arguments that negligence is a question of law; that the jury should have been told that the appellee must stop and listen before going upon the track, and that crossing the track at all on that street was a bar to his recovery. *Penn. Co. v. Frana*, 112 Ill. 398.

The jury was instructed at great length, at the instance of the appellants, and in many particulars more favorably to them than the law warrants. The supposed newly discovered evidence is merely cumulative upon points contested at the trial, and not conclusive. *Krug v. Ward*, 77 Ill. 603, and cases there cited, are but a part of the authorities in this State to the effect that such evidence is not a ground for a new trial. There is no error in the record and the judgment is affirmed.

Judgment affirmed.

Memory v. Niepert.

HENRY MEMORY
v.
HERMANN NIEPERT.

Sales—Failure to Deliver—Agency—Limitations—Damages—New Trial—Contract in Writing.

33	137
44	368
44	508
33	131
50	247
50	405
33	131
63	259

1. An alleged erroneous allowance of interest in the computation of damages in a given case, will not be considered by this court, where the motion for new trial contains no suggestion thereof.

2. In an action for the recovery of damages alleged to have been suffered through failure to deliver a quantity of bacon according to the terms of a certain writing, this court holds that the same amounted to a contract; that the action was brought in apt time, and was properly brought; that the defendant's authorization to the plaintiff to purchase the quantity named of similar merchandise and charge him with the loss, did not in any way vary the terms of the contract, and that the adoption by the trial court of the Bremen instead of the Chicago market values by which to ascertain the damages was proper in view of the acting by the plaintiff upon the written authorization of the defendant to so adjust matters.

[Opinion filed May 8, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. BISBEE, AHRENS & DECKER, for plaintiff in error.

Messrs. SMITH & PENCE, for defendant in error.

GARNETT, P. J. Appellee sued appellant in assumpsit to recover damages for the failure of the latter to deliver 250 boxes of bacon in fulfilment of the following contract :

“BREMEN, September 20, 1879.

“MESSRS. SCHMIDT & FUHRKEN,

Bremen :

“Mr. Henry Memory, in Chicago, has sold to you to-day, through my care, 250 boxes of American bacon, long clear middles, at M., 25 per 110 lbs., Engl., cost and freight Bremen, against draft at 60 days sight on your good selves or

against bankers' reimbursement, in which case one-half per cent. allowance to be returned to you. Drafts to be accepted against the delivery of documents. December or January, 1880, shipment from the west by rail to New York or Baltimore, hence by direct steamer to Bremen.

"Yours respectfully,

"FERD. EGGENA."

The trial was before the court without a jury, and the issues were found in favor of appellee, who had judgment for \$4,919.96.

At the date of the transaction in question, and for some time previous, appellee was engaged in business in Bremen, under the name of Schmidt & Fuhrken, and appellant was a merchant, having a house in Chicago. The latter was represented in Bremen by his agent or broker, Fred. Eggena, who had authority to take the contract in question. Interpreted in the light of the evidence in the case, the contract was for the sale of the bacon at 25 marks for 110 English pounds, less charges and freight to Bremen, a draft therefor to be drawn on purchaser at 60 days sight, and in case he secured a banker's guaranty thereof, he was to have returned to him by appellant one-half of one per cent on the amount. The shipment was to be made in December of that year or January following.

The principal defense made was that the action was barred by the statute of limitations, more than five years having elapsed between the time when delivery should have been made and the bringing of the action. The argument is that the instrument which constitutes the basis of the action is not a contract in writing, as it shows upon its face no agreement by appellee, and no executed consideration for appellant's undertaking. We admit there has been great difficulty in reconciling the authorities on this question, but it is now set at rest in this State, contrary to the appellant's contention. *Plumb v. Campbell*, 18 N. E. Rep. 790; *Ames v. Moir*, March term of this court, 1888. In the case last named the goods covered by the written contract were delivered after the execution of the instrument, but that makes no material differ-

Memory v. Niepert.

ence as to the character of the contract. Nothing is thereby added to the writing; no more of the contract is in writing after the delivery than before.

Another reason urged by appellant for the reversal is that by the terms of the writing an option was given to appellee to accept the draft himself, or to procure a banker's guaranty; it is said that until appellant was notified of the exercise of the option he could not ship, and as he was never so notified the fault is with appellee. We think the construction more in keeping with business usages and the terms of the writing is that the option was to be exercised when the draft was presented for acceptance. If not, why was the one-half per cent to be *returned* to appellee? The simple plan would have been to deduct the half per cent from the draft if the option was first to be exercised and notice thereof given.

Appellant wrote appellee December 4, 1879, that he would be unable to ship the goods unless there should be a decline in prices, and authorized appellee to buy the bacon in Bremen after the time for filling the contract expired and debit him with the loss. When the time had elapsed appellee bought the bacon and charged appellant with the loss, sending him at the same time a statement of the amount. To that statement Memory never objected. It is now contended that this was a new contract between the parties by which the written agreement signed by Eggena was satisfied and any recovery must be for money paid out for appellant's account.

We are inclined to think that was not the intention of the parties but that it was, in substance, merely a method of adjusting the amount of the damages, leaving the original contract in full force.

Objection is made that the court adopted the Bremen market values instead of Chicago values, when the property should have been delivered, by which to ascertain the damages. But if in fact the court followed the adjustment which appellant authorized by his letters of December 4, 1879, and which appellee accepted and acted upon, that was sufficient warrant for the action of the court whatever may be the construction of the original writing as to the place of delivery.

In the computation of damages it is said the court erroneously included interest, but in the motion for new trial there was no suggestion of excessive damages, and it is now too late to complain on that score. *Oberman Brewing Co. v. Ohlerking*, opinion filed in this court April 17, 1889.

We think there is no error in the record and the judgment is affirmed.

Judgment affirmed.

GARY, J., took no part in this case.

HENRY C. PARMLY ET AL.

V.

BENJAMIN F. HEAD.

Agency—Sales—Real Property—Commission—Defective Title—Evidence—Instructions.

1. A real estate broker who procures a purchaser, able, willing and ready to complete a sale on the terms stipulated between him and the seller, is entitled to his commission if the sale fails through the default of the seller, or his inability to make a good title.

2. Where the commission is to be paid if the sale goes through, the same can not be recovered, where a person procured by the broker verbally agrees to make the purchase, and afterward for no legal reason refuses to do so.

3. An instruction should be given, when the evidence justifies the argument to the jury that the facts supposed therein are true, and upon the assumption made the law is correctly stated, and the proposition in question is contained in no instruction given.

4. A purchaser of real estate is entitled to a merchantable title.

5. Whether or not a title is defective, is a question of law for the court.

[Opinion filed May 8, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. ELLIOTT ANTHONY, Judge, presiding.

Mr. WALLACE HECKMAN, for appellants.

Mr. GEORGE W. PLUMMER, for appellee.

33	134
55	402
33	134
57	135
33	184
106	1275

MORAN, J. This action was brought to recover from appellants \$1,000 commissions which appellee claimed was due to him for services about the sale of certain land. Appellee was not retained by appellants to find a purchaser for the land, but, knowing that they would sell it, he communicated with parties who he knew would like to buy such land, and after some correspondence about the price and talks with appellants, the latter offered to sell for \$73,000. Appellee relates what occurred with reference to commissions as follows:

“We had a meeting in Mr. Parmly’s office, Mr. Parmly, Mr. Farrar and myself, and at that meeting the question of commissions came up in regard to the sale. I said, gentlemen, you know what the usual commission is on such a sale here, two and one-half per cent. Well, they said it is quite a large deal, and we are making some concessions, and you must take less than that for your commissions. I said, gentlemen, if you make the sale promptly and quickly I will agree to take \$1,000. Then they said that if the sale went through at \$73,000, they would give me \$1,000; if I got these parties up and got them \$73,000, that I was to have \$1,000.”

Appellee thereupon telegraphed the proposed purchasers, and they met appellants at their office and a verbal agreement was made that said purchasers would take the property at \$73,000. The abstract was given to the parties to be examined, and after some time appellee stated to appellants that the purchasers’ attorneys would not pass the title; that there were defects in it that could be cured by filing a bill under the burnt record act; but appellants claimed that the title was good, that they had bought it so, and they did not propose to make any correction in it, and they would not file such a bill, and consequently the sale did not go through.

At the trial, appellee put in the testimony of attorneys to prove that the title was defective, and appellants introduced the evidence of other attorneys to sustain their contention that the title was not defective.

The court gave to the jury, at the request of appellee, the following instruction:

"Second. The jury are further instructed that if they believe from the evidence that an agreement was made between the plaintiff and the defendants whereby the defendants agreed to pay to the plaintiff the sum of \$1,000 for procuring and furnishing a purchaser for the land in question, and if the jury further believe from the evidence that, pursuant to said agreement, the plaintiff did procure and furnish a purchaser, who was accepted by the defendants, and with whom the defendants made an agreement for the sale of said land upon the terms given by the defendants to the plaintiff, then the jury are instructed that the plaintiff has earned and is entitled to the commission or compensation agreed upon to be paid to him, if from the evidence they find any such agreement was made."

The giving of said instruction was manifest error. There is no evidence in the record to sustain the first hypothesis contained in it. Appellee did not pretend in his testimony that he had been engaged to procure a purchaser for the land, but expressly testified that the agreement was that if the sale went through, and he got the parties then in negotiation to give \$73,000 for the land, he was to have \$1,000.

The remainder of the instruction is also faulty and does not state the law correctly, as applicable to this case. It was not enough to entitle him to recover under the facts of this case, that the broker should procure a purchaser who was accepted by defendants, and with whom they made a verbal agreement for the sale of the land. His purchaser must not only be accepted and agree to purchase, but he must also carry out the agreement unless prevented by the fault of appellants. The rule is, that if the broker procures a purchaser able and willing and ready to complete the purchase on the terms stipulated between the broker and the seller, the broker shall have his compensation notwithstanding the sale is not consummated, if it fails through the default of the seller, or his inability to make a good title. But where the compensation is to be paid if the sale goes through, the broker does not entitle himself to claim it, if he brings a purchaser who says he will buy, and verbally agrees to do so, but who, for

Parmly v. Head.

no legal reason, refuses to complete the transaction. Hamlin v. Schultz, 34 Minn. 534, and cases there cited. The court refused to give the jury the following instruction in behalf of defendants:

"Eighth. The jury are instructed that even though they may believe, from the evidence in the case, that Messrs. Parmly Brothers and Farrar agreed to pay the plaintiff \$1,000 for selling the property referred to in this case for \$73,000, and that Dr. Shepard was procured by the plaintiff, and did at one time express a willingness to buy said property at said price, still, if the jury further believe from the evidence in the case that said Shepard did not buy said property at said price, but afterward refused to do so, and that the real cause of such refusal was not any defect or supposed defect in the title to said property, but was in reality the fact that said Shepard found an opportunity to buy other lots adjoining said property which he preferred to said property, then the defendants are not responsible in law for the failure of said Shepard to buy said Parmly and Farrar property, and the jury should find for the defendants."

The refusal was error. There was evidence on which appellants were entitled to argue to the jury that the facts supposed in the instruction were true, and upon the assumption made the law was correctly stated, and the proposition is contained in no instruction given. Reidle v. Mulhausen, 20 Ill. App. 68; Stearns v. Reidy, 18 Ill. App. 582.

Appellants assign for error the refusal to give their instruction No. 7. We think it was properly refused. It tells the jury in substance that the purchaser would not be justified in refusing to complete the purchase on objections to the title if they "believe from the evidence that the title to said property was not substantially defective." Whether a title is defective is a question of law for the court. The jury should find the facts, but it is for the court to say whether they constitute defects, or whether, on the whole, the title is defective. Then the phrase "not substantially defective," is loose and indefinite. A purchaser is entitled to a merchantable title, a marketable title—such a one as will

bring in the market as high a price with, as without the objection. *Parker v. Porter*, 11 Ill. App. 605; *Brown v. Cannon*, 5 Gilm. 174.

Other errors complained of we deem it unnecessary to discuss, as they are not likely to occur on another trial.

For the errors indicated the judgment will be reversed and the case remanded.

Reversed and remanded.

ISAAC V. BROKAW ET AL.

v.

CORNELIUS R. FIELD ET AL.

Mortgages—Foreclosure—Limitations—Husband and Wife.

1. The makers of a mortgage are estopped from denying the indebtedness set forth therein.

2. The recitals in a mortgage setting forth the existence of a debt, accompanied by an agreement to pay the same, are "evidences of indebtedness in writing," within Sec. 16 of the act concerning limitations.

3. Where, under the terms of a mortgage, the whole debt does not become due by default in the payment of interest, and proceedings to sell under such default are begun, a tender of the sum due, with interest and expenses, will be sufficient ground for bringing the same to an end.

4. In the case presented, this court holds that both the legal and equitable estates were conveyed by the mortgage given, and that the debt of the husband was a valid consideration for the giving thereof.

5. The burden of proving the discharge of property standing in the relation of surety, by an extension of the time of payment of a debt, is upon the person contending the same was made.

[Opinion filed May 8, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. THOMAS DENT, for appellants.

Messrs. JAMES K. EDSALL and HENRY W. MAGEE, for appellees.

GARY, J. The record shows that December 27, 1872, the appellee Field, as trustee for Harriet M. Harvey, wife of James M. Harvey, and the said Harriet and James, executed a mortgage to the appellants to secure to them the sum of \$10,032.65, which the mortgage recited that James owed them for merchandise. The mortgage was not accompanied by any extrinsic evidence of, but recited that James had agreed to pay the indebtedness, on or before three years thereafter, with semi-annual interest.

July 22, 1884, the original bill, in usual form, was filed to foreclose. There was no reason why the foreclosure should not have been had without delay, upon the original bill; but by amendments, demurrers, pleas, answers, exhibits, depositions and oral testimony the record has grown to a bulk of over 350 pages, and still there is no reason why the mortgage should not be foreclosed. The amendments by the appellants have brought in a great deal of surplusage, but the facts of the execution of the mortgage, and that the indebtedness has never been paid, stand uncontested upon the record, the bill having been dismissed without the introduction of any evidence by the appellees. In 1877 James M. died, and the indebtedness was not presented in the course of administration as a claim against his estate.

The recitals in the mortgage estop the makers of it to deny the indebtedness as therein stated. This rule has been so often repeated that it seems useless to refer to cases. They run from *Crizman v. Mathews*, 1 Scammon, 148, through a large part of the subsequent volumes of the Illinois reports. *Conger v. Lancaster*, 6 Yerg. 477; *Newbury v. Rutter*, 38 Iowa, 179, and *Jones on Mtg.*, Secs. 677, 1225, show that the recitals of the existence of the debt and of the agreement of James M. to pay it, are "evidences of indebtedness in writing," to which the limitation is ten years, under Sec. 16 of the act in regard to limitations. If he had given his note for the debt, and the mortgage had been to secure it, it would have been no better than it is in the present shape.

Whether there were defaults in the payment of interest more than ten years before the filing of the bill or not, is now

of no importance. Those installments of interest have been paid. If they had not been, it may be that such of them as became due more than ten years before suit would have been barred, but that is by no means certain. *Grafton Bk. v. Doe*, 19 Vt. 463.

The provision in the mortgage that upon any such default it should be lawful to sell, does not in terms, or by construction make the whole debt due, by such default of the interest. It does not provide that the sale shall be to pay the whole debt, and no sale for more than the interest due could be made under it, unless, perhaps, the premises not being susceptible of division, the sale must be of all or not at all. And even then it seems that the appellants could only retain the amount due, and their security for the residue of the debt would be gone. *Smith v. Smith*, 32 Ill. 198. Such a provision is a mere privilege to the creditor; inoperative, and of no effect, unless he elects to avail himself of it. *Cleaver v. Herbert*, 61 Ill. 126; *Barbour v. White*, 37 Ill. 164; *Richardson v. Warner*, 28 Fed. R. 343.

And if proceedings to sell on such default had been commenced, a tender of the sum due, with interest upon it and expenses, would have been sufficient ground for stopping them. *Tiernan v. Hinman*, 16 Ill. 400; *Bane v. Gridley*, 67 Ill. 388. The debt, therefore, was not due, and the statute of limitations did not begin to run until December 27, 1875, and the bill was filed within ten years thereafter.

If the statute of 1874, in relation to the relief of sureties when the principal debtor dies and the claim is not within two years presented against his estate, can apply to this case, it will only reduce the mortgage so much as the parties resisting the foreclosure shall show would have been paid in the course of administration. All of the matter in this record as to the charge of the goods to Mrs. Harvey, the agreement of February 29, 1872, to give a mortgage, the \$10,000 bond and mortgage never used, and all the evidence, except the mortgage itself and that relating to taxes, is surplusage. There is nothing in the objection that Field, as trustee, could not mortgage. His execution of the mortgage

Manowsky v. Conroy.

carried the legal estate. Dawson v. Hayden, 67 Ill. 52; Graham v. Anderson, 42 Ill. 514; Reece v. Allen, 5 Giln. 236. By joining in it Mrs. Harvey and her husband carried the equity. Sec. 18, Act 1872, Conveyances. His debt was a valid consideration. Edwards v. Schoeneman, 104 Ill. 278.

The decree must be reversed and the cause remanded. The appellants are entitled to the same remedy upon the mortgage, and no other, that they would be entitled to if they had now to present to the court the promissory note of James H. Harvey properly described in the mortgage, to the same effect as his agreement there is recited. It makes no difference in the case whether Mrs. Harvey is a defendant in her capacity as executrix or not; no additional costs are made thereby.

This record could not be made intelligible to any but those conversant with the case, within any reasonable limits, and therefore no effort is made to state all the facts, and the law applicable to them, as their like will never happen again.

If there was any extension of the time limited for payment of the debt, without the consent of Mrs. Harvey, by which her property standing in the relation of surety, was discharged, the burden of proving such extension is upon her. Stearns v. Sweet, 78 Ill. 446.

Reversed and remanded.

GUSTAVE MANOWSKY FOR USE, ETC.,

V.

JAMES CONROY, IMPLEADED, ETC.

Garnishment—Answer of Garnishee—Truth of—Burden of Proof—Sec. 2, Chap. 62, R. S.

1. The answer of a garnishee must be taken as true in the absence of proof to the contrary.
2. The traverse of such answer by the execution creditor does not relieve him of the duty of proving the same untrue.
3. Upon garnishment proceedings wherein it is sought to reach funds claimed to be due the judgment debtor, notice having been served upon

the garnishee by sub-contractors under such debtor in conformity with the requirements of the lien law, to recover claims aggregating the balance due or more, this court declines to interfere with the verdict for the garnishee, for the reason that Sec. 2, Chap. 62, R. S., touching the appearance of claimants and the litigation of their rights, was not complied with.

[Opinion filed May 8, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Judgment was rendered in the Superior Court of Cook County for \$335.12 and costs, in favor of Edward Otto and against Gustave Manowsky; execution was issued and returned by the sheriff, no property found. Otto then filed an affidavit for garnishment, and appellee was served with summons, as garnishee, and interrogatories being filed, he answered that there was a written contract between himself and Manowsky, by the terms of which Manowsky agreed to build for him a house to cost \$1,300; that the price was to be paid in installments; that \$900 of the amount had been paid before the service of the garnishee summons, and that the remaining \$400 was not due, as Manowsky had not completed his contract; that notice under the lien law of the State had been served on him, Conroy, for liens, to the amount of about \$350, the names of the claimants and amounts being specifically stated; that the time for giving such notices has not expired, and that he believes the amount of sub-contractor's liens, to which the building is liable, exceeds the sum of \$400; that Manowsky abandoned the work before the building was completed, leaving about \$50 worth of labor and materials still to be furnished therefor; and insisting in said answer that under the statute he was entitled to retain whatever is due Manowsky to protect himself against said liens. The answer was sworn to, and a traverse thereto filed by Otto. On the trial, the judgment, execution and return were introduced in evidence. Otto then testified that the judgment was wholly unpaid, and plaintiff rested. On motion of Conroy, the court then instructed the jury to find for him, Conroy.

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Verdict was rendered accordingly and motion for new trial by appellant. Motion overruled and judgment on verdict, from which Otto appeals.

Messrs. HOLDEN & FARSON, for appellant.

Messrs. SNOWHOOK, JOHNSTON & GRAY, for appellee.

GARNETT, P. J. The only question presented is, on whom was the burden of proof? The court below, in its instruction to the jury, assumed that the answer of the garnishee was to be taken as true, in the absence of proof. That the ruling was sound, is attested by a series of decisions in this State, which must control the action of this court. *Kergin v. Dawson*, 1 Gilman, 86; *Ill. Central R. R. Co. v. Cobb*, 48 Ill. 402; *C. & St. L. R. R. Co. v. Killenberg*, 82 Ill. 295; *C. & St. L. R. R. Co. v. Hindman*, 85 Ill. 521.

The traverse of the answer did not relieve the execution creditor of the duty of proving what the garnishee declined to admit. If the answer was uncertain or insufficient in any material point, the court, on proper application, would have required a further answer. But having taken issue on the facts presented by the answer, the burden of proof remained on Otto.

Sec. 2, Chap. 62, prescribes the course to be pursued, when the fund in the hands of the garnishee is claimed by any other person; it provides that such claimant shall be allowed to appear and maintain his right, and if he does not voluntarily appear, notice shall be issued and served on him in such a manner as the court may direct. Here the parties claiming the remaining \$400 of the price of the building never appeared, nor were they served with any notice to appear, and it may well be doubted whether the court could have compelled the garnishee to litigate the validity of their claims until they were so notified. The judgment is affirmed.

Judgment affirmed.

JOSEPH KOERPER

V.

JACOB JUNG.

33	144
64	557
83	144
70	246

Sales—Fixtures—Title—Warranty of—Avoidance by Parol—Freehold—Damages—Evidence—Instructions.

1. A warranty of title contained in a bill of sale of fixtures, constituting a part of the freehold, can not be avoided by the declaration of the vendor to the vendee before the execution thereof, that he does not own them.

2. In an action for a breach of such a warranty, a recovery may be had for the value of the property in question, to a tenant occupying the premises wherein they are located.

[Opinion filed May 8, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

MESSRS. C. A. ALLEN and FRANK J. LOESCH, for plaintiff in error.

MR. LOUIS SHISSLER, for defendant in error.

GARY, J. This was an action upon a warranty of title contained in a bill of sale of fixtures of a butcher shop or meat market. With the fixtures was transferred a lease of the premises. It is conceded that the fixtures did not belong to the vendor, plaintiff in error, but were part of the freehold.

He seeks to escape liability on the ground that before the execution of the bill of sale, he told the vendee, defendant in error, that the fixtures in question were not his. The warranty is not thus to be avoided by parol. *Wadhams v. Innes*, 4 Ill. App. 642; *Wadhams v. Swan*, 109 Ill. 46; *Beach v. Miller*, 51 Ill. 206; *Keegan v. Kinnaire*, 12 Ill. App. 484; *Rawle on Cov. for Title*, Sec. 88.

At the instance of the plaintiff in error the jury were instructed that the recovery could be only what the articles were reasonably worth for the purpose of removal. It is

L. S. & M. S. Ry. Co. v. Probeck.

quite clear from the whole case that between the parties at the time of the sale, the value was considered from \$350 to \$400, and that price paid, so that if money had and received, being paid for a consideration that had failed, would lie, that would be the measure of recovery.

And in trespass for taking fixtures, the plaintiff being but a tenant, the value is to be estimated by what they are worth for use to tenant, as situated. *Thompson v. Pettitt*, 59 Ill. 101; *Lockley v. Rye*, 8 M. & W. 133; and the same rule applies on a breach of warranty of title. *Grose v. Hennessey*, 13 Allen, 389. The instruction was, therefore, more than the plaintiff in error was entitled to, but the jury, in the administration of natural justice, assessed the damages at \$350. In this they made no mistake. These views dispose of the questions in the case, and the judgment is affirmed.

Judgment affirmed.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY
COMPANY

v.

JOSEPH PROBECK.

SAME

v.

FREDERICK SCHMIDT.

Railroads—Crossings—Personal Injuries—Trains—Careless Management of—Excessive Speed—Ordinance—Flagman—Negligence of—Evidence—Instructions.

1. A law or ordinance touching the speed of passenger trains, does not apply to an engine and tender.
2. An instruction which does not confine the right of recovery for a personal injury to the ground alleged in the declaration, is bad.

[Opinion filed May 8, 1889.]

33	145
61	628
33	145
66	540

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

MR. PLINY B. SMITH, for appellant.

MR. FARLIN Q. BALL, for appellees.

GARY, J. These are cases to recover separate damages for injuries sustained at the same time by the appellees at a railroad crossing of a street in Chicago. In all respects, except the injuries, the cases are alike, and were tried at once by the same jury. The declarations each contained two counts, the first alleging careless and improper management of the train as the cause of the injury, and the second, speed in excess of that allowed by an ordinance of the city.

There was no train of cars; only an engine and tender with nothing attached. There was testimony that the flagman at the crossing was inattentive to his duty. The ordinance limited the speed of "passenger trains."

The first instruction for the appellees put before the jury as a ground of recovery, "a greater rate of speed than is allowed by the ordinance of the City of Chicago, or by the laws of the State of Illinois." The second, that the appellants were "then and there guilty of negligence which directly contributed to the injury." The cases will have to be tried again, as both these instructions are wrong. An engine is not a "passenger train." There may be the same reason for limiting its speed, but that is for the authorities of the city to determine. There is neither ordinance of the city nor law of the State, to which the first instruction could refer.

The second instruction does not confine the right of recovery to the ground alleged in the declaration. Any neglect by the flagman was a matter for the jury to consider under the instruction, but not under the declaration. In principle the fault is the same as in C. & B. & Q. R. R. Co. v. Magee, 60 Ill. 529; see, also, C. & A. Ry. Co. v. Mack, 72 Ill. 141. It is unnecessary, if not improper, to comment upon the evidence. The judgments are reversed and the causes remanded.

Reversed and remanded.

PETER D. GILEK

v.

ERNST STOCK.

33	147
66	596

Negotiable Instruments—Notes—Collection of—Injunctions—Fraud and Duress—Conflicting Claims—Voluntary Compromise—Mistake of Law.

This court will not disturb a voluntary settlement of conflicting claims, though based upon an erroneous interpretation of the law.

[Opinion filed May 8, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. F. H. TRUDE, for appellant.

Mr. EDW. U. FLIEHMANN, for appellee.

GARY, J. This is a bill in chancery, filed by the appellant, for an injunction against the collection of some promissory notes, given by him to the appellee. Whether he is entitled to any relief can not be determined upon this bill, because of the insufficiency of its allegations, and the affirmance of this decree will be no bar to another suit, upon a bill presenting a good case, or to an application on the law side of the court for an opportunity to make a defense to the notes, upon which judgments by confession have been entered. The bill seeks to make a case of fraud and duress.

The parties had been partners. The appellee wished to withdraw from the business. In the dissolution the interest of the appellant was fixed at \$4,000, and that of the appellee at 8,000. The mode adopted for a dissolution was that one Potthost became a partner with appellant, the new firm gave their notes to the appellee for \$4,000, and Potthost gave to appellee cash and notes to the amount of \$4,000. After the new

firm had been in business about fifteen months, the appellant became dissatisfied with Potthost, and bought him out for \$1,000. Potthost then owed the appellee \$2,870 on judgment notes. What became of Potthost then, the bill does not show; it may reasonably be inferred that the claim of appellee upon him had no value.

The charges of the bill upon which relief is asked are that the appellee presented to the appellant the notes of Potthost, and demanded that appellant should pay them, threatening that unless the appellant paid them, the appellee would enter judgment upon them and seize the stock and business of the appellant and the appellant believed him; that the appellee then told the appellant to come to the office of the appellee, where he repeated his threats; stated, and procured his attorney to represent to the appellant that he was liable for the amount of the notes, and that they represented a firm debt; that unless he at once paid them, his stock of groceries and business would be sold and he turned out of doors; that he believed what was so told him, and gave the judgment notes in question amounting to \$2,500, and the appellee gave to the appellant the notes of Potthost on which was then unpaid \$2,870, besides probably, some accrued interest. Now, upon these facts it is quite clear that the appellee might, in good faith, have believed that the purchase by the appellant from Potthost for \$1,000 of what the appellant had sold to him for \$4,000, of which Potthost had paid \$1,130, leaving the appellee apparently no prospect of getting anything from Potthost, was a fraud upon him, and that under an execution against Potthost he could avoid the sale by Potthost to the appellant.

All of the allegations of the bill are consistent with the hypothesis that the parties dealt with each other at arm's length, with no relation between them that took the transaction out of the ordinary rule that governs business transactions. "A voluntary compromise or settlement of doubtful or conflicting claims will not be set aside or disturbed in the courts merely because the parties may have acted under a mistake as to the law,"—quoted from *Stover v. Mitchell*, 45 Ill. 213, which was a case like this, in the circumstances that

the property of the plaintiff was being subjected to executions against his vendor, and that both the defendant and his attorney said that the judgments on which the executions issued, were liens upon the property. Many authorities are there cited in support of the doctrine. The decree sustaining the demurrer and dismissing the bill is affirmed.

Decree affirmed.

ANDREW F. WANNER ET AL.

v.

MICHAEL J. WINTERS.

*Replevin—Malice—Trover—Partnership—Damages—Actual and Vin-
didic—Estoppel—Remittitur.*

1. The acts or words of one of several partners touching property of his firm, is as to third persons in good faith acting thereon, the same as if done or said by all.
2. Where wilful acts or words of one partner, of which the rest of the firm are ignorant, result in injury to another, there can be no verdict for separate or different amounts against the individual members of the firm.
3. A firm maintaining replevin for the recovery of property purchased from their lessee through the false representations of one of its members that the said lessee was its owner, the rest of the firm being in ignorance thereof, is liable for the actual damages arising therefrom.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon.
FRANK BAKER, Judge, presiding.

MESSRS. CRATTY BROS. & ASHCRAFT, for appellants.

MESSRS. CAMERON & HUGHES, for appellee.

GARY, J. This was an action for maliciously, and without any probable cause, taking chattels of the appellee of the value, as the jury have found, of \$350, by a replevin writ, issued by a justice, with counts in trover joined.

The property had been the appellants', and they had leased

it to one Woodruff. The appellee claimed that he applied to Wanner for information in regard to Woodruff; told him that he was negotiating for a partnership with Woodruff, and to buy a half interest, and that Warner told him the property belonged to Woodruff. There is nothing in the record tending to show that the other appellant, Webber, ever had, before the property was taken on the replevin writ, any information that any such conversation was had between appellee and Wanner.

In answer to questions put to them under the statute, the jury have found that such conversation did occur; that the appellee relied upon Wanner's representation and bought from Woodruff first the one half and then the other of the property in dispute, and that when the appellants took it, it was worth \$350. They found a verdict for \$850. The taking was March 11, 1885, and the verdict September 29, 1888.

The value of the property and the interest thereon amounted, at the time of the verdict, to \$424, so that there is an excess as to Webber, against whom there was no foundation for vindictive damages, of \$426, and as to him the verdict is wrong. *Grund v. Van Vleck*, 69 Ill. 478; *Becker v. Dupree*, 75 Ill. 167. And there could not be a verdict against the appellants for separate or different amounts. *Pardridge v. Brady*, 7 Ill. App. 639. But for the actual damages the appellants, being partners, are both liable for the taking of the property of the appellee, in which taking they both joined, although his title, as against them, was by estoppel, by reason of the representations of Wanner. What either partner does or says as to partnership property is, as to third persons in good faith acting upon it, the same as if done or said by both. Story on Part., Sec. 108; *Wolf v. Mills*, 56 Ill. 360. The specific findings by the jury save this court the labor of reviewing twenty-five instructions on the part of the appellee, and thirty-two on the part of the appellants, many of them lengthy, and a couple dozen special questions.

As the appellee remits \$426, the judgment will be reversed as to that amount, and affirmed, at his costs, for the residue only, \$424.

Reversed in part and affirmed in part.

CHICAGO HANSOM CAB COMPANY

v.

SOPHIE H. HAVELICK.

Master and Servant—Cab Company—Driver—Negligence of—Personal Injuries—Evidence.

1. The credibility of the witnesses in a given case is for the jury.

2. In an action for the recovery of damages from a cab company for injuries suffered through the alleged negligence of one of its drivers, the errors complained of being of a harmless character, this court declines to interfere with the verdict for the plaintiff.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. H. S. MONROE, for appellant.

Messrs. JOSEPH S. KENNARD and JOHN GIBBONS, for appellee.

Per Curiam. This is an appeal from a judgment rendered against appellant for injuries to appellee, alleged to have been received by being run over by a cab driven by one of appellant's servants.

There is no complaint of the instructions, but it is contended that the verdict is against the evidence. The contest was upon the extent of the injury suffered by appellee. Upon this question there was great conflict of evidence, and it was manifestly settled by the jury by their giving credence to the witnesses of appellee, and refusing to believe those who testified for appellant.

The credit to be given to witnesses can be much more intelligently determined by a jury than it can be by a reviewing court, and the law gives to the jury the exclusive right to set-

tle such a question. It can not be said that the evidence does not support the verdict, and in such case the court can not interfere except for error of law.

It is contended that improper evidence was admitted over defendant's objection, and that the court made some improper intimations in questions asked some of the witnesses, and in remarks to counsel. We are of opinion that no error was made in admitting evidence, which in any manner affected the result. The errors, if, indeed, any at all were committed in this regard, were slight and immaterial. It is doubtful whether counsel has any proper exception in the record to the questions and remarks of the judge of which complaint is made, but treating them as properly excepted to, we are of opinion there was no material error in that regard.

The judgment of the Superior Court will be affirmed.

Judgment affirmed.

ABRAHAM BERNSTEIN

v.

WILLIAM PATTERSON.

Sales—Overpayment—Recovery of Surplus—Evidence.

In an action to recover an amount claimed to have been paid, over and above what was due upon a certain purchase of goods, the plaintiff alleging that, being unable to read or write, he had trusted a third person to figure for him, this court holds that his testimony alone did not warrant the judgment in his behalf.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. BLUM & BLUM, for appellant.

No appearance for appellee.

GARY, J. There is no appearance in this court by the

appellee, and it would seem that the real case can hardly be fairly presented by this record, but the court must take it as it is.

The appellee can not read or write. He bought goods from the appellant to the amount of \$70, for which he gave notes secured by chattel mortgage. He testified that in a month or six weeks after he gave the notes he paid the first one and took it up, and in a week or ten days thereafter that he paid the second one and took it up, and thereafter, down to date, more than sixteen months after the notes were given, went on paying small sums, until, as he said, he had paid in all over \$120. His excuse for thus continuing to pay was that he could not figure, and as to the \$120, a constable figured it up for him. He was the sole witness on his own behalf. The constable was not produced. He said he always got receipts some of which he had lost, but those he produced only amounted to \$60.20, and he now recovers \$60, on the assumption that, deducting the value of some goods taken away from him under the mortgage, he has overpaid that sum. His testimony alone did not warrant a recovery. If his excuse for paying after his debt was paid, that he could not figure, was sufficient, it made his testimony of no value.

The appellant and his clerk contradicted the appellee on the most material points, but it would be useless labor to take more time or space with the case.

Judgment must be reversed and the case remanded. *Peaslee v. Glass*, 61 Ill. 94.

Reversed and remanded.

DAVID R. FRASER ET AL.

v.

THOMAS HAND.

Master and Servant—Foundry—Molder's Helper—Vice-Principal—Negligence of—Personal Injuries—Defective Machinery—Improper Methods—Fellow-Servants.

In an action to recover for personal injuries suffered by an employe through the negligence of a superior servant whose orders he was bound to obey, this court declines, there being no error of law in the case, to disturb the verdict in behalf of the plaintiff.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

MESSRS. TATHAM & WEBSTER, for appellants.

MESSRS. JOHN M. SOUTHWORTH and EDWARD T. GLENNON, for appellee.

GARY, J. This is an action on the case by the appellee, for injuries sustained, as he alleges, in consequence of defects in machinery of the appellants by reason of which the appellee, while, with due care on his part, obeying the orders of a superior servant, was injured. If this version is true, the case is brought within the principle of *Chi. & A. R. R. v. May*, 108 Ill. 288.

The appellee was a helper, working with a molder in a foundry, and it was his duty to obey the molder. The particular work they were then at was moving a "flask," an iron box, then filled so heavy as to require a crane, on one side of which flask the handles, that once were on it, had been broken off. The appellee testifies, and to that there is no contradiction or corroboration, that the molder told him to hook the chain, by which it was to be raised, to the flange of the box, and it being so raised and swung, he was told to steady it down, and while so doing the chain or hook slipped on the side of the appellee, and the flask fell and crushed some of his toes. With four chains instead of two, or with precautions which might have been adopted to prevent the slipping, the accident would not have occurred; but the manner of doing the work was not under the direction of the appellee.

The injury did not occur through any carelessness of the molder in doing what he, as a fellow-laborer did; his side did

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not slip. It was a consequence of the unsafe mode adopted, with a defective flask, by direction of a superior to the appellee, and in obeying the orders of that superior he met the injury.

The appellee testified to considerable permanent disability, from the loss of his toes, as well as pain and expense. The jury assessed his damages at \$700. This is not manifestly excessive.

The verdict of juries in cases of this character, where no error of law is in the case, are usually conclusive.

Judgment affirmed.

CHARLES H. TALCOTT ET AL.

v.

GRANT WIRE & SPRING COMPANY.

Insolvency—Creditor's Bill—Receiver—Sec. 25, Chap. 32, R. S.—Injunctions—Preferences—Judgment by Confession.

Upon a contention involving the winding up of an insolvent corporation, this court holds that certain notes were given by it to plaintiff and judgment confessed thereon upon an agreement that a creditor's bill for the benefit of all the creditors of the firm should be filed; that plaintiffs were not entitled to any preference over the other creditors of the firm, and that although it was error to dismiss the intervening petition of another creditor setting forth the facts above recited, the same was cured by the decree ordering a *pro rata* distribution of the assets in the receiver's hands.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. GEORGE S. HOUSE and E. C. HAGAR, for appellants.

Mr. MILLARD R. POWERS, for appellee.

Messrs. MUNROE & GEEB, and MANNING & CASTLE, for

Joseph G. Bemis et al., and Messrs. ISHAM, LINCOLN & BEALE, for Naylor & Co.

GARNETT, P. J. On December 16, 1887, appellee, a corporation organized under the general incorporation law of this State, being insolvent, ceased business, and called a meeting of its creditors on the 21st of that month. One of its creditors, Joseph G. Bemis, in behalf of himself and all other creditors who might come in and contribute to the expense of the suit, filed a bill in equity in the Superior Court on December 17, 1887, alleging therein the names of the owners of the capital stock; that the company had ceased doing business, leaving a large indebtedness unpaid, including his own; that the company was insolvent, and praying therein for the appointment of a receiver; that the corporation might be dissolved pursuant to Sec. 25, Chap. 32, Revised Statutes, and that George Bancroft and Stephen Mershon, the president and secretary of said company, might be enjoined from assigning, incumbering or interfering with any of its assets, and from making any entries upon its books or papers. On the same day a summons was issued and served on the company, its president and secretary (who were also stockholders), and a writ of injunction in conformity with the prayer was at the same time issued and served on the president and secretary. Appellants were also simple contract creditors of the corporation, and began immediately to make efforts, through their attorneys, to secure priority over other creditors. At the meeting of creditors on December 21st, the counsel for appellants suggested that judgment notes should be given for their clients' claims, and appellee did execute and deliver to them notes and confessed judgments, as requested.

Appellants caused judgments to be entered in their favor and against appellee, by its confession, on December 21, 1887. Executions were at once issued, and returned no property found, and a creditor's bill was filed by appellants against appellee on December 22, 1887, which appellants now insist is a first lien in equity in their favor, and that they have thus secured a preference over all the other creditors. In the lat-

ter suit an intervening petition was filed by Naylor & Co., also creditors, in which they alleged that the confessions of judgment were given to appellants on their agreement to enter judgment and file a creditor's bill for the equal benefit of all the creditors. The answer of the appellee alleges the same fact. The two bills were heard together, and the court denied the petition of Naylor & Co., excluded the evidence taken thereon, and dismissed their petition, but also denied appellant's claim to a preference, and ordered a *pro rata* distribution of the funds in the hands of the receiver among all the creditors. Denying the preference to appellants is now the subject of their complaint.

Although the decree in form ignores the contention of Naylor & Co., in substance it grants all that they prayed for, and some reference by appellants to the facts asserted in the intervening petition might therefore reasonably have been anticipated. But in the brief filed for them a discreet silence on this topic is maintained, and, while the brief of appellee is largely composed of a discussion of these facts, appellants have not adverted thereto, either by oral argument or reply brief. In this condition of things the silence of appellants may be taken as a confession that the allegations of Naylor & Co.'s petition are true. Upon that alone, however, we have not relied. Examination of the record satisfies us that the petition was sustained by the proof. Appellee had consistently maintained the attitude of impartiality between these creditors. For three days prior to December 21st its officers and legal advisers had been importuned by appellants' attorneys for priority over other creditors, but all overtures to that end were steadfastly resisted until December 21st, when the creditors met in answer to the call. Although the evidence is conflicting on the point, we think it establishes with reasonable clearness that when the attorneys of appellants, at their meeting, suggested that confessions of judgment be given to enable them to enter judgments on appellants' demands, the suggestion was not assented to until assurance was given that a creditor's bill for the equal benefit of all the creditors would be filed. No good reason can be advanced why an appellee

should shift its position at that meeting and fall in with the request for preferences, which it had before that time persistently refused. In fact, one of the counsel for the appellants admits, in his testimony given in the cause, that he knew of no reason which made it the duty of appellee to give appellants preferences. There were then no judgments against the company, and all the creditors were of equal merit. No superior equity has even been suggested in behalf of appellants, nor does there appear any peculiar obligation to them which distinguishes them from other creditors. The maxim that equality is equity is applied to this case without any sense of regret.

The petition of Naylor & Co. should not have been dismissed, nor should the evidence taken thereunder have been ruled out; but as these errors were cured by the decree nothing is left for complaint. The decree is affirmed.

Decree affirmed.

FREDERICK LANGFELDT

V.

MARY McGRATH.

Trespass—Overhanging Wall—Limitations—Nuisance—Continuance—Real Property—Damages.

1. The doctrine of entireness of recovery in one action for injuries of a permanent kind, is limited to cases where the damage is caused by public improvements under authority of law, the construction thereof being done in a reasonably proper and skillful manner, so as to avoid all unnecessary loss and injury.

2. Where improvements have been imperfectly built, and there has been negligence in the mode of their construction, the person whose property has been injured thereby need not assume that the injury is a permanent one.

3. An act which the law allows, if done in a proper manner is not a nuisance, although damages may be recovered therefor as in certain cases of permanent injury, while an act done in defiance of the law, which naturally and necessarily injures the property of another must be looked upon as such.

4. A wall so built as to overhang the property of another is a nuisance for which an action may be maintained.

Langfeldt v. McGrath.

5. In such case the damages must be limited to the time of commencing the suit, and the measure thereof to such injury to the value of the use and occupation, as may have accrued after the acquirement of title and before the bringing of suit.

6. In the case presented, this court holds that the measure of damages is the difference between what the value of the use and occupation of the land in question would have been during the period named, had the wall not overhung the same, and what it was as the wall actually stood.

7. In such cases there can be no recovery for any time anterior to the plaintiff's right of possession.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. JOHN T. RICHARDS, for appellant.

Mr. WILLIAM J. ENGLISH, for appellee.

GARNETT, P. J. In 1882 appellant was the owner of a lot on Archer avenue in Chicago, which was west of and adjoining another lot then in possession of appellee's husband. A brick building was erected by appellant on his lot, the east wall thereof being completed in February of that year. That wall was not true, but to some extent overhung the lot in McGrath's possession. About January 1, 1886, McGrath died, and later in that year his widow, appellee, made preparations to put up a four-story brick building on the lot of which her husband had been in his lifetime in possession. Her architect then discovered that appellant's wall was not plumb, and he thought it necessary to reduce the building to three stories, which he then determined to do, and which was accordingly done. In the progress of building she found the overhanging of appellant's wall had increased after she began the work on her house, and this made some change in her west wall necessary, but she actually built such foundations and walls (excepting a part of her west wall) as were necessary for a four-story building, although they were much more expensive than a three-story building required. This

action was originally in ejectment, having been commenced by appellee against appellant, May 7, 1887, but by consent of the parties was changed to an action of trespass on the case, and the declaration charges appellant with wrongfully building his said wall overhanging the premises of appellee, so as to make the latter unsafe and dangerous, and to prevent her from erecting proper and suitable buildings thereon, and that her possession and enjoyment have been greatly damaged and injured, and she has been deprived of great gains from the use of her premises.

The defense was that the injury was permanent, and having been committed in the lifetime of Michael McGrath and before appellee acquired title, the right of action was in him alone and could not be assigned, and that if it could be assigned the original cause of action was barred by the five-year statute of limitation. A verdict for \$575 was found for appellee, and judgment thereon having been rendered the defendant appealed. There appears to be a distinction between injuries permanent in their nature, which are authorized by law, and those which are wrongful and without legal sanction. The doctrine of entireness of recovery in one action for injuries of a permanent kind is limited to cases where the damage is caused by public improvements under authority of law, the construction thereof being done in a reasonably proper and skillful manner, so as to avoid all unnecessary loss and injury. *O. & M. Ry. Co. v. Wachter*, 123 Ill. 440.

But when the improvement, such as a bridge, has been imperfectly built, and there has been negligence in the mode of its construction, the party whose property is damaged is not bound to assume that the structure will be a permanent one. To indulge in such assumption would be to take it for granted that the party building, having done a wrong, intended to continue in such wrong doing. *C., B. & Q. R. R. Co. v. Shaffer*, 124 Ill. 112.

An act which the law allows, if done in a proper manner, can not be considered a nuisance (*C. & E. I. R. R. Co. v. Loeb*, 118 Ill. 203), although damages may be recovered therefor, as in the common case of permanent injury by the opera-

tion of railroads to premises adjoining their right of way; but an act committed in defiance of law, which naturally and necessarily injures the property of another, as in the case at bar, is a nuisance. "An action may be maintained for the creation of a nuisance, and a subsequent action may be maintained for its continuance. The continuance of that which was originally a nuisance is regarded as a new nuisance, and although a recovery may be barred upon the original cause, an action on the case may be brought at any time before an entry is barred, to recover such damages as have accrued by reason of its continuance within the statutory period." C., B. & Q. R. R. Co. v. Shaffer, *supra*. Even if appellee might have treated the injury as permanent (C. & E. I. R. R. Co. v. Loeb, *supra*) we do not understand that she has so elected. On the contrary she seeks to recover damages for the continuance of the wrong. There can be no doubt that the overhanging wall was a nuisance, for which an action was maintainable, (Cooley on Torts, 567,) and appellee was therefore entitled to recover. The basis of her recovery in the trial court, was, however, unwarranted. The theory of the court as shown by the admission of evidence over the objection of appellee, was, that she might recover the value of the fourth story of the proposed building, over the cost thereof, and the difference in the expense between the walls and foundations for a four-story and a three-story house. Following that measure of damages appellant's liability would depend on the contract which appellee had made for the improvement of her property; that is, if she had agreed to build a fourteen-story house, the damages would be very large; but if her contract was only for a small one-story building on the easterly side of her lot, remote from appellant's wall, the damages might be merely nominal. The making of her contract was unknown to appellant and entirely beyond his control. Yet by the rule adopted in ascertaining the damages, if the contract had been for a fourteen-story building, he might have been held to pay the value of appellee's lot, and at the same time she remain the owner of it. What is the true measure of damages? If the suit was for condemnation of that part

of the lot overhung by the wall the limit of compensation would be the market value of the land to be taken, and such damage as the remainder of the land would suffer on account of the taking. In that case the injury would be treated as permanent. But in the case presented by this record there can be no recovery for permanent injury. The damages must be limited to the time of commencing the suit, and the measure thereof to such injury to the value of the use and occupation, as may have accrued to plaintiff's lot after she acquired her title and before she brought suit. The first question will be, what was the value of the use and occupation, during the period named, if appellant's wall had not overhung any part of appellee's lot? And next, what was the value of the use and occupation, during the same period, with appellant's wall as it actually stood? The difference is the measure of damages. *Francis v. Schoellkoff*, 53 N. Y. 152.

In conclusion it should be said, we have assumed that appellee had the right of possession of the lot she claims from a period prior to the beginning of her improvement, but there is no satisfactory evidence in the record that she had either possession or right of possession before that time. She certainly can not recover damages for any time anterior to her right of possession.

For the error in admitting the evidence referred to the judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN W. SCOTT ET AL.

V

JOHN MAGLOUGHLIN ET AL.

Trust Deed—Foreclosure—Note—Consideration—Lack of—Fraudulent Conveyance—Alimony.

1. A conveyance made by a husband for the purpose of defrauding a wife, seeking a divorce, of alimony or maintenance, can not stand.

Scott v. Magloughlin.

2. Equity will not foreclose a trust deed given with such an end in view.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Mr. C. C. MARCH, for appellants.

Messrs. WILSON & ZOOK, for appellees.

GARNETT, P. J. The bill in this case, filed by John W. Scott, as trustee, against John Magloughlin, Robert Blair, William T. Blair and others, prays for a foreclosure of a trust deed, dated February 2, 1885, executed by Magloughlin and wife to Scott, to secure payment of Magloughlin's note of that date for \$1,000. One of the defenses set up is that Robert Blair was the equitable owner in fee of the premises conveyed by the trust deed, and that the note and trust deed were executed at the instance of his attorney, William T. Blair, to protect the property for Robert's benefit, against his wife, who at the date of the transaction had a divorce suit pending against him.

The Superior Court found there was no consideration for the note, and dismissed the bill for want of equity. There was no lawful consideration for the note. The evidence in the record satisfies us that the purpose of making the note and trust deed was to guard the property against attack by Robert Blair's wife.

A conveyance made by the grantor for the purpose of defrauding his wife of alimony or maintenance, is so tainted that a court of equity will not enforce an agreement of the grantee, made at the same time, to hold the property in trust for the grantor. *Tyler v. Tyler*, 126 Ill. 525.

Equity will not foreclose a mortgage executed to defraud creditors of the mortgagor. *Miller v. Marckle*, 21 Ill. 152. That the claims of a wife to maintenance stand on the same

footing as the claims of creditors, can admit of no doubt since the decision in *Tyler v. Tyler*.

The transfer of the note by *mesne* assignments to Albert B. Clark, one of the appellants, vests in him no greater right, in a suit to foreclose the trust deed, than the original holder had. *Olds v. Cummings*, 31 Ill. 188, and numerous other cases, decided since, concur in this rule. It is not necessary to examine any other of the questions argued. The decree is affirmed.

Decree affirmed.

GABRIEL JACOBS ET AL.

V.

E. L. KASTHOLM ET AL.

Partnership—Dissolution—Receiver—Settlement by Attorney—Authority to Act.

This court holds that the solicitor of certain co-partners was duly authorized by them to act according to his best judgment, touching proceedings instituted for the dissolution of the firm of which they were members.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

MESSRS. WALKER & JUDD, for appellants.

MESSRS. ABBOTT, OLIVER & SHOWALTER, for appellees.

Per Curiam. A bill for the dissolution of the partnership and for an account was filed by some of the co-partners against the others. A receiver was appointed, and assets of the firm were converted, and an examination of the books and papers of the partnership was made by the receiver and a statement in writing submitted to the parties, showing the expenses and

disbursements, and the balance remaining in the receiver's hands, and the shares of said balance, to which the parties respectively were entitled; and appellants and appellees by their solicitors agreed to an order which the court entered, reciting among other things, that the parties, "having approved the doings of the receiver as so reported, and agreed to the distribution of said balance, as shown by said report, and as below set forth, and agreed and stipulated that said receiver shall be discharged when he shall have distributed and paid said balance pursuant to his order, and that said bill of complaint shall be thereupon dismissed without costs." Subsequently, and at the same term, appellants moved the court to set aside said decree on the ground that they were not consulted by the solicitor about the matter, that the order was entered wholly without their knowledge or consent and against their wishes, and that appellee was owing to the firm upward of \$1,500. The court overruled the motion, and from said order of the court appellants have appealed. The appeal brings before the court only said order denying the motion to set aside the decree.

There is a conflict of evidence on the question whether appellants gave their solicitor authority to settle the case in his discretion and upon the best terms he could get. The solicitor so swears, and says that in agreeing to the order he acted according to his best judgment and for the best interests of appellants, as he understood the matter. He swears that Richard J. Duggan was present on one occasion, when one of appellants told him to settle the case, and said Duggan swears that he heard appellant, Gabriel Jacobs, tell his solicitor to make the best disposition of the case that his judgment would suggest. It is denied by each of the appellants by affidavit, that they, or either of them, ever authorized the solicitor to settle the case. We can not say upon the evidence in the record, that the court erred in overruling the motion to set aside said order. If the solicitor was given the authority which he claims he had, the decree was binding on appellant, provided the solicitor acted according to his best judgment, and there is no evidence whatever that would lead to

the belief that in consenting to the decree he did other than what he believed to be for the best interest of those whom he represented.

On the whole record, we are inclined to the opinion that it is fairly made out that he had the authority to act as he did for appellants. The order of the court denying the motion to set aside the decree will therefore be affirmed.

Decree affirmed.

HENRY B. ROBINSON

v.

JOHN B. RAULSTON, RECEIVER.

Creditor's Bill—Judgment—Confession of—Preference—Attachment—Garnishment—Injunctions.

A court, or receiver appointed by it upon bill filed by certain stockholders of a corporation praying among other things for the dissolution thereof, its directors alone being named as defendants therein, acquire no control over stockholders thereof.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

Messrs. CAMPBELL & CUSTER, for appellant.

Messrs. HOYNE, FOLLANSBEE & O'CONNOR, for appellee.

GARY, J. September 20, 1888, Leopold J. Kadish, in his own behalf and of all others similarly situated who might desire to join him as complainants and pay their share of the expenses, filed in the Circuit Court his bill in chancery against the Chicago Co-operative Brewing Association, alleging that he was a stockholder in, and creditor of, the corporation; that the corporation, September 18, 1888, confessed a judgment in

favor of one of its directors, which "is a preference and null and void;" that under execution upon that judgment, and attachments in other cases, including one in favor of Kadish, the sheriff had levied upon perishable property, which, unless taken care of, would become worthless; that the corporation had been doing a losing business; that dissensions existed among the directors and they could not agree upon any plan for rescuing the corporation from its difficulties, but all thought it proper to have a receiver appointed.

The prayer was for a receiver, an injunction against further business, setting aside of the judgment, winding up of the business, and a distribution of its property. The directors, but not the stockholders, were made defendants. No cause mentioned in Sec. 25 of the Act concerning Corporations, for which a bill may be filed, is alleged in the bill. September 22, 1888, the appellee was appointed receiver. The appellant had commenced, before the bill was filed, an attachment against the corporation, and by an amendment of the bill was made a defendant, upon the allegation that he had, or claimed to have, some interest in the property of the corporation. February 5, 1889, the appellee filed a petition stating that without leave of the court, the appellant had commenced garnishment proceedings against a stockholder named, and others, to compel them to pay for his use, sums due from them as stockholders, and praying an injunction, which petition the appellant answered, admitting the fact, insisting upon his right to prosecute his garnishments, and denying the right of the receiver to collect from the stockholders what might be due from them. The court awarded the injunction.

It is not necessary in this case to inquire whether, under the power conferred by Sec. 25, on courts of equity, "on good cause shown, to dissolve or close up the business of any corporation," any other cause would be good, than some one of those specifically mentioned in the section itself. In one part of the appellee's brief it seems to be conceded that it would not, and the tendency of the cases, *Hyde Park Gas Co. v. Kerber*, 5 Ill. App. 132, and *Chi. Mut. Life v. Hunt*, 127 Ill. 257, is in the same direction.

It is clear, however, from the cases of the Larnar Ins. Co., Chandler v. Brown, 77 Ill. 333, followed in 83 Ill. 288, 84 Ill. 275, and 92 Ill. 55, that the stockholders are not affected by the present bill. Neither the receiver nor the court obtained any hold upon them by it.

Several persons are named as defendants in this bill, without any allegations showing why, but among them is not the name of the one against whom the garnishee process issued. It would be a convenient way of escaping or postponing the liability of delinquent stockholders of an insolvent corporation, for some of them to file a bill against the corporation and all its creditors, and get the affairs into the hands of a receiver, if thereby they could stop their creditors, without giving anybody else the right to pursue them.

As the appellant was not seeking his remedy from any fund over which the court had obtained control, he ought not to have been enjoined, and the order awarding the injunction is reversed, and the cause remanded with directions to the Circuit Court to dissolve the injunction.

Order reversed.

33	168
187	499
33	168
64	344
33	168
78	653
33	168
89	498

JOHN RING

V.

THE UNITED STATES LIFE AND ACCIDENT ASSOCIATION.

Insurance—Life and Accident Companies—Policy—Conditions—Assessments—Levy of—Jurisdiction—Pleading.

1. Where the contract in a mutual insurance certificate provides that upon a death the corporation shall make an assessment and pay over the proceeds, not exceeding a certain amount, in an action thereon, the declaration must charge a refusal or failure to make the assessment and allege that if the same had been made it would have resulted in the amount which the plaintiff claims as damages.

2. The allegations necessary in a pleading is to be determined from the language of the contract on which the rights of the parties depend.

3. In an action to recover upon an insurance certificate, the same agreeing that the amount named therein should be paid at the death of

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one of two persons named, to the survivor, this court holds that the demurrer to the declaration was improperly sustained.

[Opinion filed May 29, 1889.]

IN ERROR to the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

This action was brought to recover on an insurance certificate. The declaration counts on a policy of insurance which is set forth *in haec verba*. The portions of the certificate and declaration material in this case are as follows:

"The United States Life and Accident Association of Chicago, Illinois, by this certificate of membership, witnesseth, that in consideration of the statements, representations and agreements made to it in the application for this certificate, and a membership fee in hand paid, and for a semi-annual due of \$1.50 on each \$1,000 herein named, to be paid within thirty days from date of this certificate, and semi-annually thereafter, and the further payment of an assessment proportioned to the maximum indemnity herein provided for to be made according to the table of graduated assessment ratios given hereon, to be paid at the death or disability of a member, do assure the life of J. and M. Ring for \$2,000, in case of death or permanent and total disability for life; or one-fourth the amount for the loss of an arm or leg; or \$10 weekly indemnity, in accordance with the terms and conditions of this certificate.

"And the said association does hereby promise and agree to pay said claim at its office in Chicago, Illinois, to disabled member, if living; if not, to survivor at the death of either beneficiary, or the said beneficiary's heirs, executors and administrators, etc., within ninety days after acceptance and approval of proofs of death or disability of said party whose life is hereby assured.

"This certificate is issued by this association and accepted by the assured upon the following terms and conditions."

"Indemnity Fund.—Upon the death or disability of a mem-

ber the surviving members whose certificates have been in force thirty days from date of notice thereof, will be required to pay an assessment, not to exceed one a month, for each \$1,000, for indemnity above named, according to the table of graduated assessment ratios, the proceeds of which shall form the indemnity fund, which shall be used, first, in the *pro rata* payment of weekly benefits occurring in the month assessed for, and the balance to be paid *pro rata* among said month's matured indemnity, other than weekly benefits, but in either case will not exceed amount named in this certificate. Any part of said indemnity fund not consumed in the payment of one month's matured indemnity will be placed to surplus, which will be distributed *pro rata* among the beneficiaries, when an assessment is not sufficient to pay one month's matured indemnity in full; and when said surplus shall accumulate, sufficient in amount to pay one month's matured indemnity in full, the same will be used, and no assessment made on account of such indemnity."

And the plaintiff avers that the J. and M. Ring mentioned in said policy were the plaintiff, John Ring, and Mary Ring, his wife, and that at the time of the making of the said policy and from thence until the death of the said Mary Ring, as hereinafter mentioned, he had an insurable interest in the life of the said Mary Ring, so by the defendant insured as aforesaid.

And the plaintiff further avers that thereafter, to wit, on the 4th day of May, A. D. 1887, the said Mary Ring departed this life, and that the said plaintiff, John Ring, is the survivor in said policy mentioned, and that forthwith, after the death of the said Mary Ring, the plaintiff therein gave notice thereof to the defendant, giving the name and residence in full, the cause and date of death or disability, and number of certificate, and demanded of the said defendant that it furnish to the plaintiff the association proof blanks upon which to make preliminary proof of the death of said Mary Ring; but the defendant thereupon refused to furnish such proof blanks, and refused to pay the amount of said policy, on the ground that said certificate or policy of insurance was null and void,

and forfeited by reason of the non-payment of assessments thereon.

And the plaintiff further avers that within thirty days after the execution of said policy he paid or caused to be paid to said defendant a semi-annual due of \$1.50 on each \$1,000 therein mentioned, and that semi-annually thereafter he paid a semi-annual due of \$1.50 on each \$1,000 mentioned in said policy, and from and after the date of said policy paid all assessments made and assessed upon said policy to be paid at the death or disability of a member of said association of which the said defendant gave notice; nevertheless, although the plaintiff has kept and performed all things in the said policy mentioned on his part to be kept and performed, the defendant has not yet paid to the plaintiff the said sum of \$2,000 in said policy mentioned or any part thereof, but refuses so to do, wherefore the plaintiff says that he is injured, etc., etc., and brings his suit.

There was a demurrer to said declaration which was sustained by the court, and plaintiff electing to stand by his declaration, judgment was rendered for defendant, and the case is brought to this court by a writ of error, and sustaining the said demurrer is the error assigned.

Messrs. RUBENS & MOTT, for plaintiff in error.

This positive and unequivocal contract to pay \$2,000 can not be affected by the existence or absence of a surplus fund nor by the refusal or consent of defendant in error to levy an assessment; these financial questions will be more worthy of consideration when plaintiff comes to collect his judgment.

Where the certificate promises to pay a stated sum, and that an assessment shall be made upon all the members for the full amount named in their respective certificates, and the sum so collected, less cost of collection, shall be paid, the beneficiary is entitled to recover the full amount of the certificate, unless it is reduced by some defense, and a court of law has jurisdiction. *Suppiger v. Covenant Mutual Benefit Association*, 20 Ill. App. 595.

“Where a policy contains an undertaking on the part of the insurance company to pay the beneficiary therein named

\$2,000 upon the death of the assured, and not to exceed seventy-five per cent of the assessments collected, the beneficiary may recover on said policy without proving demand on the company to make assessments or showing that assessments have been made, or, if made, the amount collected thereon. *Kansas Protective Union v. Whitt*, 36 Kas. 760.

In a New York case defendant issued a certificate by which there was to be paid to plaintiff, in ninety days after the proof of the death of a member, "a sum equal to the amount received from a death assessment," not exceeding an amount named. Held, in an action to recover the amount due, that the promise to pay was not contingent upon the existence of a fund from which to make payment; the requirement that payment was to be made within ninety days implied an obligation to make an assessment to raise the fund; that having power to make it, defendant could not resist payment by omitting to make it; the proof of death operated as a demand for payment, and by implication, a demand that the proper steps be taken to procure the necessary funds. *Freeman v. National Benefit Society*, 42 Hun, 252.

In the case at bar the promise also is to pay within ninety days after receipt of proofs of death.

In the following cases—*In re Solidarite Mut. Ben. Ass'n*, 68 Cal. 392; *Ball v. Granite State Mut. Aid Ass'n*, 9 Atl. Rep. 103; *Newman v. Covenant Mut. Ben. Ass'n*, 33 N. W. Rep. 662; *Tobin v. Western Mut. Aid Ass'n*, Id. 663; *Ranisbarger v. Union Mut. Aid Ass'n*, Id. 626; *Smith v. Covenant Mut. Ben. Ass'n*, 24 Fed. Rep. 685; *Curtis v. Mut. Ben. Life Co.* 48 Conn. 98—the certificates were wholly different from that sued upon here, providing expressly for the payment merely of the amount to be realized by one assessment, and to be paid, in many instances, only after collection. In an action upon such certificates it would be necessary to make the averments claimed by defendant in error to be necessary in this case; but the doctrines of these cases have no application here—the contract being essentially different. This is a contract to pay \$2,000.

MESSRS. CRATTY BROS. & ASHCRAFT, for defendant in error.

MORAN, J. It is contended in support of the judgment of the Circuit Court, first, that no action at law can be maintained on the contract set out in the declaration; that the remedy is to be had in equity only. Counsel for defendant in error cite a number of cases in support of this contention, among others, *Covenant Mut. Ben. Ass'n v. Scars*, 114 Ill. 108. In that case the undertaking of the association as stated in the certificate was, that on the proof of the death of the member, he having complied with the conditions of the certificate, an assessment should be levied upon the surviving members to the amount of the certificate, \$5,000, "which sum so collected on such assessments the association agrees well and truly to pay," etc. The heirs of the deceased member filed a bill in equity and one of the grounds of defense was that the court had no jurisdiction—that there was an adequate remedy at law. The court said: "The certificate of membership does not contain any contract to pay to the beneficiaries \$5,000, or any sum absolutely, but to levy assessments ratably upon all members holding certificates in force at the death of decedent, for the amount not less than the limit of the certificate, and to pay over the sum so collected on such assessments, less the collection costs. As the corporation is not organized for 'pecuniary profit,' has no surplus, and relies entirely upon the mortuary assessments made upon each death for the payment of benefits to the beneficiaries of a decedent, it would be difficult to realize anything by execution. * * *

"It would seem that a court of equity might properly be resorted to as being capable of affording a more adequate remedy, by directing a specific performance of the contract of the defendant by the levying of the proper assessments."

That case is undoubtedly an authority that where the contract is not to pay a sum absolutely, but to levy an assessment and pay the proceeds thereof, not exceeding a certain sum, to the beneficiary, equity will give redress in the nature of specific performance of the contract; but it is by no means an authority that an action at law might not be maintained on the same contract, and a judgment recovered. There is a large class of cases arising on contract, where equity will take jurisdiction as furnishing a more direct and complete remedy

than the law court, yet where there is no doubt of the jurisdiction at law, if the party elects to pursue his remedy on that side of the court. In suits on certificates of benefit societies, there seems to be some contrariety in the decisions. The contracts of the different corporations differ in form. Some are absolute in the promise to pay a certain sum upon the member's death. Others provide that upon the death of the member, the company shall only pay over the proceeds of certain assessments, not to exceed a stipulated amount. In this latter class of cases, "It is not entirely agreed what remedy is most proper, if the association denying its liability refuses to levy the promised assessment, for the authorities are not in harmony. * * * The decided preponderance of authority is in favor of the view that an action at law can be maintained against the society for a refusal or neglect to make the assessment." Bacon, Benefit Societies, Sec. 453, and cases there cited.

The certificate sued on in this case, differs essentially from those in cases cited by counsel for defendant in error. In nearly all said cases the contract is not absolute for the payment of a certain amount, but is that the association shall levy an assessment and pay the proceeds thereof, not exceeding the amount named in the certificate to the beneficiary. Such cases are *Smith v. Covenant Mutual Benefit Ass'n*, 24 Fed. Rep. 685; *Bailey v. Mutual Benefit Ass'n*, 71 Iowa, 689; *Newman v. Covenant Mut. Ben. Ass'n*, 72 Iowa, 242; *Burdon v. Mass. Safety Co.*, 17 N. E. Rep. 874; *Egleston v. Association*, 5 McCrary, 484; *Curtis v. Mutual Benefit Life Company*, 48 Conn. 98.

In most of said cases the question decided was the sufficiency of the allegations in the declaration or complaint at law, and if the contract here sued on was similar in its terms to the contracts on which the actions in said cases were brought, the decisions would be authorities in support of defendant in error's second contention, which is that the demurrer was well sustained, for the reason that the declaration does not aver that an assessment had been made and collected, or the number of members liable to assessment, and the amount that could have been made by an assessment.

Ring v. U. S. Life and Accident Ass'n.

Where the contract is that the corporation shall make an assessment, and pay over the proceeds not exceeding a certain amount, it is well settled that the declaration must charge a failure or refusal to make the assessment, and that if such assessment had been made it would have resulted in the amount which plaintiff claims as damages. The New Home Life Assurance Co. v. Hazen, 23 Ill. App. 457; Abe Lincoln Mut. L. & A. Society v. Miller, 23 Ill. App. 341, and cases cited, *supra*.

The certificate here sued on is not a contract to make an assessment and pay over the proceeds, but an absolute promise and agreement to pay the amount named to the survivor, at the death of either beneficiary, etc., within ninety days after acceptance and approval of proofs of death. Sec. 5th, it is true, shows how the indemnity fund for the payment of losses is to be created and kept up, but it in no manner limits the amount payable under the certificate to what might be collected from one assessment, nor does it provide that an assessment shall be specially levied to pay a loss on any particular certificate. The scheme is to create and keep up a general fund, out of which losses shall be paid as they occur. It follows that good pleading only required the plaintiff to set out the certificate, and allege the death and the performance on his part of the conditions required of him, and that he has sufficiently done in the declaration to which the demurrer was sustained. Protective Union v. Whitt, 36 Kan. 760; Freeman v. National Ben. Society, 42 Hun, 257; Neskern v. North W. E. & L. Ass'n, 30 Minn. 406; Lueder's Ex'r v. Annuity Co., 12 Fed. Rep. 465; Excelsior Mutual Aid Ass'n v. Riddle, 91 Ind. 84. The allegation necessary in a pleading is to be determined from the language of the contract on which the rights of the parties depend.

In our opinion the declaration is entirely sufficient in alleging a cause of action on the certificate set out, and for the error in sustaining the demurrer thereto the judgment of the Circuit Court must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

CHARLES G. SMITH

v.

JAMES MCCARTHY.

Negligence — Insecure Area Rail—Personal Injuries — Contributory Negligence—Damages—Loss of Time—Special Interrogatories—Evidence —Instructions—Practice.

1. The general verdict in a given case will control, where the special finding therein can upon any hypothesis be reconciled therewith.

2. Interference by the trial court with the right of the jury to pass upon the question of negligence, is justifiable only when the verdict is against the weight of the evidence.

3. An instruction setting forth that damages may be assessed for the plaintiff's time while being cured, and for a permanent injury, if proved, is not seriously contradictory.

4. The grounds of the objections to evidence offered by way of impeachment should be specific.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. ELLIOT ANTHONY, Judge, presiding.

Messrs. EDWARD MAHER and A. D. RICH, for appellant.

Messrs. J. LYLE KING and T. MORRISON, for appellee.

GARNETT, P. J. In this action appellee recovered a verdict and judgment for \$2,000 against appellant for personal injuries received through the alleged negligence of appellant. At the time of the injury Smith was the owner of a business building in Chicago, having an area adjoining the sidewalk, and a stairway in the area leading to the basement of the premises. Around the outer edge of the area was an iron guard which was secured by stanchions let into the sidewalk. The stanchions at the time in question, and for some time previous, were loose and the rail unsteady. The evidence

Smith v. McCarthy.

tends to show that McCarthy was talking to an acquaintance near this guard on October 4, 1886, and on turning round struck the rail, which gave way, and he was precipitated into the area and severely injured. Evidence was also given, tending to prove that Smith's agent had known of the unsafe condition of the guard long before that date.

In answer to a special interrogatory to the jury, they said that appellee, at the time he fell, was leaning against the rail or post. Counsel for appellant assumes that this finding is contradictory of the general verdict, which finds appellant guilty. If that is true, it must be because leaning against the rail, even unintentionally and but for an instant, is *per se* and as a matter of law, such negligence on the part of the appellee as to bar his recovery. If the special finding can, upon any hypothesis, be reconciled with the general verdict, the latter will control, and the court will not render judgment against the party who has the general verdict in his favor. Pahlman v. Taylor, 75 Ill. 630.

Now, is there any hypothesis upon which the special finding in this case can be reconciled with due care on the part of appellee? He may have been entirely ignorant of the condition of the guard, and he may have struck the rail as he turned round without intending to do so, and he may have been instantaneously, without fault on his part, and without any opportunity to recover his balance, thrown into the bottom of the area where he received the injuries complained of, and these facts are all consistent with the special finding and are supported by evidence which the jury had the opportunity to believe and did believe. But aside from this, negligence is a question of fact for the jury, and interference by the court with their right to find on that question can only be justified where the verdict is manifestly against the weight of the evidence. This doctrine is one of the common-places of the law, and citation of authority is superfluous. It is sufficient to say that the record now before us presents no such case of preponderance of evidence as requires the verdict to be set aside.

One of the instructions for plaintiff told the jury that if

they found the defendant guilty, they might assess damages for plaintiff's loss of time while being cured, if there was such a loss, and for any permanent injury, if such permanent injury was proved. Appellant insists that there is a contradiction here in the alleged hypothesis that plaintiff was cured on the one hand, and on the other that he was permanently injured. This is manifestly but a verbal criticism which has no merit. The expression of the instruction may not be philologically exact, but we must assume that the trial court performed its duty by discharging from the panel all jurors who were not of sound judgment, and not well informed, and if that duty was performed, there is no reason to apprehend that the jury were misled to the injury of the appellant by this trifling slip of the pen.

There was no direct evidence given by any physician as to the probable duration of the plaintiff's injuries, but from the facts sworn to by the plaintiff himself, the jury might properly have drawn the inference that he was disabled for life, so that it can not be said, as appellant claims, that there was no evidence to support the hypothesis of permanent injury.

The objections of the defendant to the evidence offered to impeach the physician who was introduced as a witness for appellant, were too general in their character to be available here. The grounds of the objection should have been specifically pointed out, as they might have been removed.

There is no error in the record, and the judgment is affirmed.

Judgment affirmed.

UNION MUTUAL ACCIDENT ASSOCIATION

V.

MINNA FROHARD.

Insurance—Mutual Accident Companies—Certificate of Membership—Conditions—Construction of—Breach—Death While Hunting—Burden of Proof—Decree.

33	178
50	428
33	178
46	378

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1. The act of hunting does not amount to the occupation of hunting.
2. A classification of hazards of an insurance company confined exclusively to occupations, does not cover isolated acts.
3. A policy of insurance must be construed liberally in favor of the assured.
4. The burden of proof is upon a mutual insurance company to show in case of loss that an assessment would not realize the amount at risk. The presumption is to the contrary.
5. It is proper to require payment in full where an association refuses to levy an assessment upon the untenable ground that it is liable only for a portion of the sum named.
6. That portion of a decree directing payment by the officers of such company, no officer thereof being a party to the suit, is nugatory and can not be complained of.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. JOHN M. HAMILTON and CHARLES C. GILBERT, for appellant.

Messrs. HAMLINE & SCOTT, for appellee.

The by-laws could not be changed to affect the amount payable in case of death. *Northwestern Benefit and Mutual Aid Association v. Wanner*, 24 Ill. App. 360; *Morrison v. Wisconsin Odd Fellows, etc.*, 59 Wis. 162; *Becker v. Farmers' Mutual, etc.*, 48 Mich. 610.

Engaging in an act which is, or may be at times, engaged in by men of any occupation or profession, is not changing occupation within the meaning of the contract. *Administrators of Stone v. United States Casualty Co.*, 34 N. J. 371; *The North American Life Accident Co. v. Burroughs*, 69 Pa. St. 43; *Miller et al. v. Travelers Insurance Co.*, 40 N. W. Rep. 839.

To make effective a provision of the certificate limiting the amount to be paid in case the insured should be killed while engaged in any act classed as more hazardous than that in which he was insured, the association should have made a classification of acts, which it did not do. Payment, as pro-

vided by both by-laws and certificate, was to be according to the rate of the *occupation* in which the member was engaged. The word *act* was not used in that connection. The contract will be construed most strongly against the association. *North Western Benefit and Mutual Aid Ass'n v. Wanner, supra*; *Administrators of Stone v. U.S. Casualty Co., supra*; *District Grand Lodge v. Cohn*, 20 Ill. App. 335.

The printed "manual" offered in evidence by appellant, contains the association's own interpretation of this clause of its contract, which agrees with that contended for by us. The manual may properly be considered in construing the contract. *May on Insurance*, Sec. 356; *Ruse v. The Mutual Life Ins. Co.*, 24 N. Y. 654; *Wheelton v. Hardisty*, 92 Eng. C. L. 231; *Brooklyn Life Ins. Co. v. Dutcher*, 95 U. S. 269.

It having been stipulated that the number of members liable to contribute was more than sufficient to make up the full amount of \$5,000 by payment of one regular assessment, if members would all pay, the court properly decreed that the full sum be paid. *Suppiger v. Covenant Mutual Benefit Co.*, 20 Ill. App. 599.

In absence of proof as to amount to be realized by one assessment, in view of the failure to levy the assessment, and of defendant's ability to show what would have been realized from such assessments, and the plaintiff's inability to do so, it will be presumed that the assessment would have realized full amount. *O'Brien v. Home Ben. Society*, 46 Hun, 429; *Kansas Protective Union v. Whitt*, 36 Kan. 761; *North Western Benevolent and Mutual Aid Ass'n of Illinois v. Wanner*, 24 Ill. App. 357; *Elkhart Mutual Aid, etc., Ass'n v. Houghton*, 2 N. E. Rep. 763; *Leuder's Ex'rs v. Hartford Life and Annuity Co.*, 12 Fed. Rep. 465; *Excelsior Mutual Aid Ass'n v. Riddle*, 91 Ind. 84; *Neskern v. N. W. Endowment & Legacy Ass'n*, 30 Minn. 406; *Freeman v. National Benefit Society*, 42 Hun, 252; *Earnshaw v. Sun Mutual Aid Ass'n (Md.)*, 12 Atl. Rep. 884.

The decree against the association for the deficiency was proper. *Earnshaw v. Sun Mutual Aid Ass'n*, 12 Atl. Rep. 884; *Swett v. Citizens Mutual Aid Ass'n*, 78 Me. 541; *O'Brien*

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v. Home Benefit Society, 46 Hun, 426; Covenant Mutual Benefit Association v. Sears, 114 Ill. 108.

Association failing to levy an assessment is a wrongdoer, and can not take advantage of its own wrong by asserting that members might not have paid. Freeman v. National Benefit Society, 42 Hun, 252; Birnbaum v. Passenger Conductors, etc., 15 Weekly Notes of Cases (Pa.), 518.

Joining in the decree with the association "its proper officers" was not error, but had it been, appellant not being injured thereby, can not take advantage of such error. Hannas v. Hannas, 110 Ill. 53; Brown v. Miner, 21 Ill. App. 60.

GARNETT, P. J. Appellant is a corporation organized under the law of this State, for the purposes of carrying on the accident insurance business. It insures its members against death or disability from external, violent and accidental causes only.

On the first day of September, 1885, John Frohard was accepted as a member of the association, and on that date a certificate or policy of insurance was issued to him. In this certificate it is provided "that John Frohard, by occupation, profession or employment, a merchant, residing at Sparta, State of Illinois, is accepted as a member in division 'A' of said association, subject to all the requirements, and entitled to all the benefits thereof, as provided in the by-laws, and that said member, in case of death occurring through external, violent and accidental injuries, is entitled to participate in the mortuary or relief fund of the association, not to exceed the amount of \$5,000, which sum, or such part thereof as may be collected for that purpose by the payment of one regular assessment of two dollars (\$2) for each member of the association liable at the date of the accident, shall, within sixty (60) days after sufficient proofs have been received, be paid to his wife, Minna, if surviving. * * * It is expressly stipulated and agreed that in the event of the member being either fatally injured or otherwise disabled while engaged temporarily or otherwise in any act or occupation classed as more hazardous than the one in which he is accepted, according to the classification given by the rates and by-laws of this

association (or if not specifically mentioned, approximating thereto) then an amount shall be paid equal to the rate of the occupation in which the member is engaged when receiving the injury, and such amount shall be payment in full upon the part of the association. * * * It is expressly stipulated and agreed that this certificate is issued and accepted subject to all the provisions, conditions, limitations and exceptions herein contained or referred to."

On January 26, 1887, the insured went hunting with a gun, and while climbing a fence accidentally shot and killed himself. Proofs of death having been made, and the sixty days having elapsed without payment, suit in equity was brought by the beneficiary named in the policy to compel appellant to levy an assessment of \$2 for each member of the association liable at the date of the accident, for the purpose of paying the amount specified in the policy, or such part thereof as might be collected on the assessment. There was also a prayer for general relief. The answer alleged that the insured was killed by the discharge of a gun while hunting, and that hunting was an occupation classed by the association as more hazardous than the one in which the insured was accepted as a member of the association, and that by virtue of its by-laws appellee was only entitled to receive \$500, which had been tendered. On the hearing the court directed the levy of the assessment and the payment of the amount thereof to complainant, and in case the sum collected should be less than \$5,000, the association and its proper officers were decreed to pay complainant the difference between \$5,000 and the amount so realized from the assessment. By stipulation of the parties it appears that the number of members liable to assessment at the date of the accident was more than enough to make \$5,000 by one assessment, if the members all paid.

The *act* of hunting is not equivalent to the *occupation* of hunting. The case of *N. A. Life and Accident Ins. Co. v. Burroughs*, 69 Pa. St. 43, furnishes a close analogy on this point. See, also, *Stone's Adm'rs v. U. S. Casualty Co.*, 34 N. J. 375. The classification of hazards in appellant's by-laws is confined to occupations. They do not profess to classify

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acts. Until the act is classed as more hazardous than the occupation in which the insured was accepted as a member, he may engage therein temporarily for exercise or recreation without reducing the amount of risk incurred by the association. The terms are made by the company; the by-laws and certificates are framed in language chosen by itself, and it must be presumed to have made all the exceptions to its liability that it deemed desirable. The court must follow the general rule of construction, and interpret the policy liberally in favor of the insured. *May on Ins.*, Sec. 175; *Stone's Adm'r's v. U. S. Casualty Co.*, *supra*.

In this case the association refused to make an assessment as it had undertaken to do by its contract with the deceased, and it now says that the decree should not have ordered payment of the full sum of \$5,000, because it is uncertain what amount can be realized from the assessment. But to whose fault is the uncertainty chargeable? The appellee could not make the assessment, and appellant wrongfully refused to make it, and fails entirely to make any showing by pleading or proof as to the amount that can be collected from the members liable at the date of the accident. If this contention of appellant is sustained, the value of the policy in question might now be greatly diminished, on account of inability to collect from those liable to assessment when the death happened. If any such change has taken place, it is not just that the loss should fall upon appellee, when appellant alone is to blame. *Newman v. Cov. Ben. Ass'n*, 40 N. W. Rep. 91, 92.

The authorities say that the burden is on appellant to prove that an assessment would not realize the full sum insured. Until proof on that point is made, the stipulation showing enough members to raise the \$5,000, the presumption is that the entire amount of the insurance could be collected. *Northwestern B. & M. A. Ass'n v. Warner*, 24 Ill. App. 363; *Neskern v. N. W. E. & L. Ass'n*, 30 Minn. 406; *Elkhart Mut. Aid Ass'n v. Houghton*, 103 Ind. 286; *Kansas Protective Union v. Whitt*, 36 Kans. 760; *Freeman v. Nat. Ben. Soc.*, 42 Hun, 252; *Lueder's Ex'rs v. Hartford L. & A.*

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Ins. Co., 12 Fed. Rep. 465; Cov. Mu. Ben. Ass'n v. Hoffman, 110 Ill. 603.

If appellant had diligently proceeded in the execution of its contract by levying an assessment and making all reasonable efforts to collect the same, a different case would be presented; but as it has denied its liability for any sum over \$500, and wilfully refuses to perform its contract, it is only right that it should be required to pay any deficiency arising from failure to collect the assessment.

That part of the decree directing payment of the deficiency by the proper officers of the association is nugatory (no officer thereof being a party to this suit), and is no ground for assignment of error. The decree is affirmed.

Decree affirmed.

CHARLES B. EGGLESTON

V.

ASAHEL GAGE.

*Real Property—Tax Deed—Redemption—Injunctions—Title—Cloud—
Sec. 211, Revenue Statute.*

Upon a bill filed to enjoin the taking out of a tax deed of certain real estate and to remove certain documents spread upon the records, as a cloud upon the title thereof, this court holds, that Sec. 211 of the Revenue Statute applies to cases where the land is a second time sold for the taxes of a succeeding year.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. HENRY M. SHEPARD, Judge, presiding.

Mr. N. M. JONES, for appellant.

Mr. AUGUSTUS N. GAGE, for appellee.

MORAN, J. The bill in this case was filed by appellant to enjoin appellee from taking out a tax deed of certain real estate described, and to remove certain documents which were spread of record in the recorder's office of Cook county, from the records, as being a cloud upon the title to said land. The principal question relates to appellant's right to have a certain tax sale certificate which appellee holds, canceled on the ground that there was a redemption from the tax sale.

It appears that the property was sold to appellee on September 21, 1880, for the eighth installment of the South Park special assessment, and that the 22d day of September, 1880, it was again sold to John Carne, Jr., for the delinquent general taxes for the year 1879. At the time of such sales the land in question was owned by one Nicholas, the grantor of appellant, and on March 16, 1881, less than six months after said tax sales, said Nicholas, by his attorney, redeemed from the sale to Carne by paying the amount of the sale plus twenty-five per cent interest thereon, and the fees and costs, and paid to the county clerk the exact amount of the sale to appellant and the clerk's fees for filing, and received from the clerk a redemption certificate.

Appellant's contention is, this was a full redemption from the sale to appellant under Sec. 211 of the Revenue Statute, which provides that "If any purchaser of real estate sold for taxes or special assessments shall suffer the same to be again sold for taxes or special assessment before the expiration of the last day of the second annual sale thereafter, such person shall not be entitled to a deed for such real property until the expiration of a like term from the date of the second sale, during which time the land shall be subject to redemption upon the terms and conditions prescribed in this act; but the person redeeming shall only be required to pay for the use of such first purchaser, the amount paid by him. The second person shall be entitled to the redemption money as provided for in the preceding section."

It is argued that appellee purchased the land for a special assessment on the 21st of September, and then suffered it to be sold to Carne for the general taxes on the 22d; that

Carne was the second purchaser and was entitled to the redemption money, and that appellant, being the first purchaser, was entitled only to the amount paid by him; that the two sales were made upon different precepts, to different persons, and to satisfy different judgments, and that to say that the second purchaser mentioned in the statute is one who purchased at a subsequent annual sale for taxes, is to interpolate the statute with words which the legislature did not use, and to give it a meaning which was not intended by the law makers.

We should have no hesitation in assenting to the contention of appellant, were it not for the decision of the Supreme Court in the case of *Gage v. Parker*, 103 Ill. 528. The distinction suggested between this case and that, is that here the sales are made to different persons while there the different sales were all made to the same person. As we understand *Gage v. Parker*, the distinction is not tenable. We should be very glad to avoid the doctrine of that case, on any very plausible grounds, but it is binding on us, as a court, and we must follow it until the Supreme Court shall see fit to modify or overrule it.

The decree of the Superior Court must therefore be affirmed.

Decree affirmed.

MICHAEL REICH

v.

ADELAIDE M. BERDEL.

Injunctions—Dissolution of—Damages—Attorney's Fees—Separation of Services—Rehearing.

1. Damages may be assessed upon a litigant's liability for attorney's fees on the dissolution of an injunction obtained against such person, and non-payment thereof on his part is no bar to a recovery.

2. In such case the damages allowed should only cover services rendered touching such dissolution.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ROBERT JAMIESON, Judge, presiding.

Messrs. BLUM & BLUM, for appellant.

Mr. E. A. SHEEBURNE, for appellee.

GARY, J. This is an appeal from a decree awarding damages to the appellee upon the dissolution of an injunction which the appellant had obtained against her.

The award is principally for attorney's fees, which three attorneys testified were usual and reasonable fees. That she had not paid them was no obstacle to her recovery, as she was liable to pay her attorney a usual and reasonable fee, and for that liability damages may be assessed. *Richardson v. Chasen*, 59 E. C. L. 756, 10 Ad. & El. (N. S.) 756.

Decree affirmed.

On Petition for Rehearing.

[Opinion filed October 23, 1889.]

GARY, J. On the 29th of May last an opinion was filed affirming the decree in this case. On the petition of the appellant a rehearing was granted upon the suggestion that the damages allowed upon the dissolution of the injunction covered the expense of defending the whole case.

When the injunction was dissolved the appellant voluntarily dismissed his bill. The appellee had filed a plea and answer, and her solicitor in preparing that plea and answer, and in obtaining such information in regard to the facts as enabled him to prepare them, had necessarily done much that would have been useful for the defense of the suit upon its merits, if the appellant had prosecuted it. All the services which were recited in the evidence, except the notice of, and attendance upon the motion to dissolve the injunction, and all the

expenses of exhibits, were applicable to the defense upon the merits.

The injunction was but in anticipation that the final relief might be complete if the suit was successful. The evidence does not separate the services and show the usual price and value of such as were applicable to the dissolution of the injunction only. The decree is reversed and the cause remanded. *Gerard v. Gateau*, 15 Ill. App. 520.

Reversed and remanded.

88	188
106	*689

NETTIE PARKE

v.

L. C. WELCH AND SEYMOUR C. WELCH.

Life Insurance—Certificate—Suit on—Beneficiaries—"Affianced Wife"—Interpleader—Constitution and By-Laws—Class Entitled to Benefit Named Therein—Failure to Designate Person Belonging Thereto.

1. The naming of an "affianced wife" as the beneficiary in a certificate of a mutual benefit association, she remaining such until the death of the assured, does not operate to make her a dependent within the rules thereof.

2. The designation as a beneficiary of a person not included within the class to be benefited under the rules of such association, does not relieve it from payment to the proper person or persons of the amount involved.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

This case arises on a bill of interpleader filed by the Supreme Council of the Royal Arcanum, a corporation organized and existing under and by virtue of the laws of the State of Massachusetts, against appellant and appellees, who were respectively claiming the sum of \$3,000 which was due from said Royal Arcanum upon a benefit certificate issued to W. D. Welch. Said W. D. Welch was a member of a subordi-

nate council of said Royal Arcanum, located at Chicago, and on the 22d of April he surrendered a certificate which had previously been issued to him, payable to his mother, and procured a new one to be issued to him, "payable to Mrs. Nettie Parke, affianced wife," which he delivered to appellant. On November 20, 1887, said W. D. Welch died at Waukegan, Illinois, in good standing, and satisfactory proofs of his death were made as required by the rules of the order.

Appellees are the brothers of said W. D. Welch, deceased, and they protested against the payment of the fund due under said certificate to appellant, as they claimed she was not entitled to the same under the constitution and laws of said corporation. The portions of the by-laws of said Royal Arcanum that relate to this matter of benefit funds and certificates are Sec. 2, Law III, of said order, as follows :

First. Each applicant shall enter upon his application the name or names and relationship or dependence of the members of his family or those dependent upon him to whom he desires his benefit paid, and the same shall be entered in the benefit certificate according to said direction.

Second. A benefit may be made payable to the following classes of persons: Class 1st. To a member's wife, children, grandchildren, father, mother, grandparents, brother or sister. In every one of which cases no proof of dependency shall be required before the issuing of the benefit certificate. Class 2d. To any person who is dependent upon the member for maintenance (for food, clothing, lodging or education), in which case the written evidence of the dependency, within the requirements of the laws of the order, must be furnished to the satisfaction of the Supreme Council before the benefit certificate can be issued.

Third. No entry shall be made in any application or benefit certificate or otherwise permitting the designation by, or ascertainment by reference to, any will of the person or persons, trustees or beneficiaries to whom any benefit shall be payable, or the amount or share of any beneficiary. No will shall be permitted to control the appointment or distribution of, or the rights of any person to any benefits payable by this order.

Fourth. A benefit certificate can not be made payable to a creditor, nor be held in whole or in part, nor assigned to secure any debt which may be owing by the member. Any assignment of a benefit certificate by a member or beneficiary shall be void.

Fifth. No benefit shall be made payable to any person or persons permanently residing outside the limits of the United States or Dominion of Canada.

Sixth. No benefit shall be payable to a person or persons of the second class mentioned in Par. 2 of this section, unless the dependency therein required to be shown, exists at the time of the member's death, in which case proof of such dependency at the member's death shall be furnished in writing, to the satisfaction of the Supreme Regent, before payment of the benefit shall be made. If at the time of the death of such member, the dependency shall have ceased, then the benefit shall be payable to the persons mentioned in class 1st, paragraph 2, of this section, if living, in the order of precedence as therein enumerated. If no one of said class shall be living at the death of the member, the benefit shall revert to the Widows' and Orphans' Benefit Fund.

Section 3 of said Law III provides "that a member may, at any time when in good standing, surrender his benefit certificate, and a new certificate shall thereafter be issued, payable to such beneficiary or beneficiaries as such member may direct in accordance with the laws of this order, upon the payment of fifty cents. Said surrender and direction must be made in writing, signed by the member, and forwarded under seal of the subordinate council with the benefit certificate to the Supreme Secretary; parol evidence of intention or desire to change the beneficiary must be disregarded."

"The issuing of such new certificate shall cancel and render null and void any and all previous certificates issued to such member."

It was stipulated between the parties that certain designated chapters of the public laws of Massachusetts relating to the organization of benefit societies should be considered in evidence, and was further stipulated that L. C. Welch and

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Seymour C. Welch were the brothers, next of kin and only heirs at law of said W. D. Welch, deceased, and that Nettie Parke was the affianced wife of said W. D. Welch at the time said certificate was issued, and that she was not actually dependent upon him, nor represented so to be within class second of Law III of the constitution and laws of the Royal Arcanum, either at the time the certificate was issued, or at the time of his death, otherwise than that he gave her occasional presents of clothing, jewelry, money, etc., up to the time of his death; and that said certificate was delivered to said W. D. Welch in the State of Illinois, and by him delivered to said Nettie Parke in the State of Illinois.

The court decreed the fund to appellees, and from such decree this appeal is prosecuted.

MESSRS. CASE, JUDSON, HOGAN & BRADLEY, for appellant.

MESSRS. ABBOTT & BAKER, for appellees.

MORAN, J. The contention of appellant is that she is the person named in the certificate, as entitled to the fund; that the corporation having made the contract with the member, and it being executed on the one part, it would be estopped to deny its liability thereon (*Benefit Associations v. Blue*, 120 Ill. 121), and if not estopped, the corporation alone would have the right to set up its non-liability, and it having admitted liability by bringing the money into court, it should be paid to the person for whose benefit the certificate was issued. *Johnson et al. v. Van Epps*, 110 Ill. 557.

The doctrine which is asserted as controlling the case, finds its most apt illustration in *Knights of Honor v. Watson*, 15 Atl. Rep. 125, recently decided by the Supreme Court of New Hampshire. There the constitution of the order authorized the issuing of a certificate to a member payable "to some member or members of his family or person or persons dependent on him, as he may direct or designate by name to be paid as provided by general law."

A part of a benefit was made payable to a person not of the

family and not dependent upon the member, and the other beneficiaries who were members of the family of the deceased objected to the payment of any of the sum to the person named. The corporation paid the money into court, and compelled the claimants of the fund to interplead, and the court held that if the direction to pay to the person who was neither one of the family nor dependent upon the member, was invalid, the benefit to that extent would lapse, if the corporation so elected, for want of a valid exercise of the power of direction; but that the question as to such validity could be raised by no one but the corporation, and it not having raised the question, but signified a willingness to have it paid to the party named, and no other person having any right to object or interest in the money, it should be paid to said person. The features which distinguish this case from *Knights of Honor v. Watson*, and from the cases decided by our Supreme Court are to be found in the constitution and laws of the Royal Arcanum, and in the construction which has been given by the Massachusetts Supreme Court to the statute under which said corporation is organized.

In *American Legion of Honor v. Perry*, 140 Mass. 580, that court said: "The statute under which the plaintiff corporation is organized, gives it authority to provide for the widow, orphans or other persons dependent upon deceased members, and further provides that such fund shall not be liable to attachment. The classes of persons to be benefited are designated, and the corporation has no authority to create a fund for other persons than of the classes named. The corporation has power to raise a fund payable to one of the classes named in the statute, to set it apart to await the death of the member, and then to pay it over to the person or persons of the class named in the statute selected and appointed by the member during his lifetime, *and if no one is so selected, it is still payable to one of the classes named.*"

The object of the organization of the Royal Arcanum, so far as it had regard to a benefit fund, is stated in the bill to be, "To establish a widows and orphans' benefit fund, from which, on the satisfactory evidence of the death of a member

of the order who has complied with all its lawful requirements, a sum not exceeding \$3,000 shall be paid to his family, or to those dependent upon him as he may direct."

According to the constitution of the order which is in the record, every member of the order is required to pay assessments to the widows and orphans' benefit fund, rated according to the member's age, and it is provided in Sec. 2, Law I, that "there shall be paid on the death of every member who is in good standing and not under suspension for any cause at the time of his decease, the following amounts: For a full rate member, \$3,000; for a half rate member \$1,500."

Section 2, Law III, set out in the statement of facts, directs the manner in which a member shall designate the particular person of his family or those dependent upon him to whom he desires his benefit paid, and if it is to be made payable to one of the dependent class, requires that written evidence of the dependency (for food, clothing, lodging or education) shall be furnished to the council before the certificate shall be issued. The sixth clause of said Sec. 2 forbids payment to any person of the second or dependent class named in a certificate unless the dependency required exists at the time of the member's death, and "if at the time of the death of such member the dependency shall have ceased, then the benefit shall be payable to the persons mentioned in Class 1st," if living, in the order of precedence as enumerated.

Consideration of the various sections of the constitution, in connection with the statute of Massachusetts as construed, leads to the conclusion that the designation of a person, in the benefit certificate, who does not belong to one of the classes named, does not operate to relieve the corporation from payment of the benefit, if persons are in existence belonging to the classes for whom the fund is established. The designation may be invalid, but the benefit will not lapse. Naming a person outside any class, is the same in legal effect as selecting no particular person, and in such case, as we have seen, the fund is payable to one of the classes named. The person named is not defeated by the doctrine of *ultra vires* because the fund is by the law payable at all events if persons belonging

to the class who may take are in existence, and the doctrine of estoppel can not be invoked against the corporation, for it admits its liability and pays over the fund, and it must go to the persons of the class for whom it was created for the reason that it was not in the power of the member to divert it to a person not within the classes named. *Rockhold v. Canton, Mass., Mut. Ben Ass'n*, 19 N. Y. Rep. 710; *American Legion of Honor v. Perry*, *supra*; *Elsey v. Odd Fellows Mutual Relief Ass'n*, 142 Mass. 224; *Daniels v. Pratt*, 143 Mass. 216.

It is suggested that the naming of appellant in the benefit certificate was a practical determination by the corporation that an affianced wife was a dependent, and that, as she remained his affianced wife till death, the benefit is payable to her under the rules of the association. This is but an attempt to apply the doctrine of estoppel. But the proposition is not true in law, for the Massachusetts court has decided that "the mere engagement to marry imposed no obligation upon him, except to carry out his contract with her. Their mutual promise to marry did not in any sense, by itself, make her dependent upon him," (*American Legion v. Perry, supra.*) nor true in fact, for the parties have stipulated that, at the time said certificate was issued, she was not dependent upon him, nor represented so to be.

In determining the rights of parties under certificates in these benefit associations, the policy of the State in which the association is organized must be kept in view, and regard must be had to the limitations placed by the constitution of the society and the statute upon the power of members to designate beneficiaries. "Where the power is special it must be exercised within the restrictions imposed by the terms of its creation, which are contained in the charter and by-laws, as modified by statute." *Bacon, Benefit Societies*, Sec. 244.

Where the beneficiaries are prescribed by law, it is an evasion of its policy and a violation of its letter to say that where a member has named a person not within the class to be benefited, and the corporation has issued the certificate to

such person, such acts shall deprive the proper person or class of persons of all right to or interest in the fund. As said by the Supreme Court of Kentucky, "where the charter prescribes who shall be the beneficiaries of the membership after the death of the member, it is not in the power of the company or of the member, or of both, to alter the rights of those who by the charter are declared to be the beneficiaries, except in the mode and to the extent therein indicated."

However apt and just the rule in *Knights of Honor v. Watson* may be, therefore, in a case where the fund should lapse, and no persons have any interest in it, and where it, if not paid to the person named in the certificate, would not be paid at all, we are of opinion that such rule has no proper application in the case now under consideration.

The decree of the Superior Court is right, and will, therefore, be affirmed.

Decree affirmed.

GARY, J., dissenting. My view of this case is that the appellant is entitled to the money in controversy.

The Supreme Council of the Royal Arcanum having paid the money into court, to be paid to one or the other of these parties, no question as to the obligation of the council to pay it is in the case. *Knights v. Watson*, 15 Atl. R. 125.

On the face of the certificate it is payable to the appellant. Her legal title can only be avoided by showing a superior right in the appellees. If it were now a question whether the certificate was properly issued, payable to her, it would be a strong argument in her favor, that the council, having given a practical construction to their own law, by issuing such certificate payable to her, upon the hypothesis that an "affianced wife" was properly included in class 2, without any further proof of dependency than what was implied from that relation, and that relation not having ceased at the time of the death of W. D. Welch, and he having paid all his dues and assessments up to the time of his death, upon the promise of the council to pay her, the council is estopped to deny that the state of facts upon which they issued the certificate is

sufficient to entitle her to require them to perform the promise on the faith of which they receive such dues. *Benefit Ass'n v. Blue*, 120 Ill. 121. She was the object of the solicitude of W. D. Welch.

The lot of most women, in most of the relations of life is a dependent one. The future of a woman engaged to be married depends very greatly upon the man to whom she is affianced. It is doing no violence to the language which described class 2, to include within it, not only those to whom the member at the time the certificate is issued is furnishing food, clothing, lodging or education, but also those with whom he has such existing relations, that acting in good faith, he thereafter will so furnish them.

In the case of *Supreme Council v. Perry*, 140 Mass. 580, the council was no party to the designation of the lady as the beneficiary. The council there was bound to pay somebody upon a certificate, as to the validity of which there was no question, and had had no part in the selection of any individual as beneficiary. It is true that the court there held a by-law of the council, under which she was entitled to take, invalid, as contravening their statute, under which the council was organized. In a proper case, it would be a serious question whether the rights of citizens of Illinois, under contracts made in Illinois, to be performed in Illinois, are to be affected by statutory provisions of which they are ignorant, in another State.

JAMES M. HILL

v.

ALEXANDER H. LOWDEN.

Master and Servant—Relation—Existence of—Services Rendered—Recovery for—Written Contract—Construction—Custom—Evidence.

1. Each and every part of a written contract should, when possible, have assigned to it some meaning.

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2. The employer of a superintendent of construction under a written contract is not liable for the wages of a third person employed by the latter to perform the work in question, in the absence of knowledge of such employment, and of evidence of a custom authorizing the employment of a second general superintendent in such case.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. G. FRANK WHITE, for appellant.

Messrs. ABNER SMITH and J. M. CLEAVER, for appellee.

GARNETT, P. J. Appellee brought an action of assumpsit against appellant to recover the balance alleged to be due him for services as superintendent of certain buildings of appellant, while they were in the course of erection on Oakwood boulevard, in Cook county. Appellee was employed by U. P. Smith at the agreed sum of \$1,000 for his entire services as such superintendent. Smith's only authority to employ him was derived from the following contract:

"This agreement made this 20th day of May, 1886, between U. P. Smith and James M. Hill, witnesseth, that said Smith agrees to build for said Hill four houses on Oakwood boulevard, on lots 7 and 10, in block 3, Cleaverville addition, town of Hyde Park, Cook county, Illinois, like the two brown stone houses on Groveland avenue, in Chicago, Illinois, owned by A. H. Lowden, and known as 32 and 34 in said avenue, and have same completed on or before October 1, 1886. Two of said houses to have brown stone fronts like said Lowden's houses, and two of them to have pressed brick fronts with brown stone trimmings; said Smith to attend to purchasing of all the materials to be used in the construction of said houses, and the employment of mechanics to do the work, and to attend generally to all matters pertaining to the erection of said houses, giving the time and attention necessary to do the work to the best advantage, and for the best price pos

sible, using his best judgment and exercising his best endeavor to purchase all material at the lowest figure, and so generally to conduct said business as to build in the best manner and at the lowest price possible for the benefit of said Hill. All contracts to be made by said Smith, and all bills approved by him are to be paid by said Hill as they become due, said Smith to have the general superintendence and management of the whole business, for which service said Hill agrees to pay the said Smith the sum of \$2,000 from time to time as the work progresses.

JAMES M. HILL,
U. P. SMITH."

At the trial, evidence was given tending to prove that Smith gave but little attention to the buildings, and that Hill, when he saw Lowden engaged there, supposed he was put there by Smith in his place. Lowden's name was on Smith's pay roll, and Hill's checks were drawn to pay the amount thereof, Hill being sick much of the time and most of his checks being drawn while he was confined to his bed. There was no evidence that Hill knew anything of Lowden's name being on the pay roll until the buildings were nearly completed, nor was there any evidence that he knew Lowden's name was on any pay roll which he paid, until he discovered that he had overpaid Smith for superintendence. Lowden made out his bill against Smith personally for the balance of \$400, which he seeks to recover in this action, not describing him in the bill as agent or superintendent.

The \$300 that was paid to Lowden, he admits was received from Lamb, the timekeeper of Smith. Hill testified, without contradiction, that when the buildings were finished Smith and Lowden came to the house, and wanted him to pay Smith so he could pay Lowden. Evidence was also given tending to show that Lowden did not give the buildings proper attention as superintendent. The court instructed the jury to find a verdict for plaintiff, which we think was error. The court assumed that by the terms of the written agreement between Hill and Smith, the latter could employ such assistance as he chose, and Hill was not only conclusively bound by the contracts

made by Smith, but that he could not deny that such contracts had been fulfilled by the persons so employed. By the terms of the contract Smith agreed to be the general superintendent, and in the absence of evidence of a custom authorizing the employment of another general superintendent, Hill can not be charged a second time for services which now appear to have been due from Smith personally. Hill testified that Smith had the reputation of being a tremendous hand to build buildings of that kind cheap and well, and that he knew Smith had built a good many buildings. Appellee contends that the only specific duties which the contract imposed on Smith were to purchase the material, employ mechanics, and make all contracts, and that the words "attend generally to all matters pertaining to the erection of said house," and "to have the general superintendence and management of the whole business," mean practically nothing. This is in conflict with the general rule of construction which requires that each and every part of the contract shall be given a meaning when that can be reasonably done.

"Every clause and even every word should, when possible, have assigned to it some meaning. It is not allowable to presume, or to concede when avoidable, that the parties in a solemn transaction have employed language idly." Bishop on Contracts, Sec. 384.

It is true that Smith was authorized to make all contracts, and in fact did make a contract with Lowden. But to say that Hill and Smith understood the authority to be, to bind Hill to any contract, for anything, in connection with the work described in the instrument, would be wholly unreasonable. If that was the intention, then the person employed to purchase materials and make contracts might have employed a third person as his substitute to purchase the materials, employ mechanics and make all other contracts. It is no more reasonable that the person originally employed to superintend should employ a substitute as superintendent. As this record now reads, neither was admissible. Variation from the contract could only be by consent of both parties. Hill could not consent to anything of which he was ignorant. If he,

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without objection, saw Lowden performing the duties of superintendent, the jury might be justified in finding that he had impliedly consented that Smith should fulfill his contract by putting Lowden in his place; but unless he was in some way informed that Lowden was employed as superintendent, at his expense, or some such custom as we have referred to has intervened and modified the terms of the written contract, Hill can not be charged with the expense of two general superintendents.

For the error specified the judgment is reversed and the cause remanded.

Reversed and remanded.

MORAN, J., dissents from the construction given to the contract.

ADAM L. AMBERG

V.

CHARLES C. PHILBRICK.

Bailments—Trovee—Chattels—Conversion—Master and Servant—Servant's Wrongful Act—Master's Liability.

An involuntary, gratuitous bailee is not liable for the refusal of his servant to deliver the goods of another when he has not been informed that application has been made therefor, and has given no orders touching the same.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MESSRS. HOYNE, FOLLEANSBEE & O'CONNOR, for appellant.

MR. CHARLES T. STRATTAN, for appellee.

GARY, J. This was an action of trover for chattels belonging to the appellee, of which the appellant had such possession as resulted from putting a man in charge of the premises in which the appellee had placed them. The premises had been in the possession of a company in which the appellee had some interest, so that he could store the chattels there without expense to him.

The appellant took possession under a chattel mortgage against the company. Some weeks after the appellant took possession, his man in charge sent a postal card to the appellee to take his chattels away, but when the appellee went for them, the man refused to deliver them without a receipt "in good order."

The appellee never applied to the appellant for the chattels, and it did not appear that the appellant had ever been informed that the appellee ever applied for his property. On these facts it was held on the trial, both by rulings upon the admission of evidence and upon instructions, that the act of the man in charge was conclusively the act of the appellant, and his refusal a conversion of the chattels by the appellant.

While a demand upon, and a refusal by, the servant of a pawnbroker or common carrier, within the scope of whose employment it is to determine whether a delivery shall be made, may be evidence of a conversion (*Jones v. Hart*, 2 Salk. 441; *Cass v. N. Y. Cent. R. R.*, 1 E. D. Smith, 522), yet in the case of a pledge, such a refusal by the general agent, but without being directed by his principal, is not. *Pothonier v. Dawson*, 1 Holt's N. P. C. 383; 3 E. C. L. 154. This case is cited as authority in 2 Greenl. on Ev. Sec. 645; 2 Sel. N. P. 1395, and 1 Arch. N. P. 604, and nowhere denied. "*Communis opinio* is of good authority in law." Co. Litt. 186 A; Broom's Leg. Max. 140.

A banker, receiving a special deposit, is not liable for a conversion of the subject of the deposit by his servant, unless he participated in it, or was guilty of negligence in retaining the servant. *Sturges v. Keith*, 57 Ill. 451.

As the appellant was an involuntary as well as gratuitous bailee, to the extent that he was a bailee at all, no more strin-

gent rule should be applied to him than to a voluntary bailee. He ought to be allowed to show that the refusal by the man in charge was not by his authority, or rather, he ought not to be required to show anything, unless there was a *prima facie* case that it was by his authority.

The judgment must be reversed and the cause remanded.

Reversed and remanded.

EDWARD J. SCANLAN ET AL.

V.

TIMOTHY H. SCANLAN.

Trust Deeds—Foreclosure—Sale—Equity of Redemption—Dower—Release of—Laches—Evidence.

1. A formal deed is not required for the release of an equity of redemption when the mortgage is made in the form of an absolute conveyance.

2. If in such case subsequent transactions between the mortgagor and mortgagee make it inequitable to allow redemption, equity will refuse its aid.

3. The fact that a wife received no consideration for a release of her right to dower can not affect the validity thereof.

4. Upon a bill brought to redeem certain real estate, and a cross-bill praying that a dower right might be set aside therein, this court holds, that the deceased mortgagor, together with his wife, in his lifetime, sold all interest possessed by them in the land in question, and that the consideration therefor was duly paid.

[Opinion filed May 29, 1889.]

IN ERROR to the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. JAMES E. MONROE, for plaintiff in error.

Messrs. SMITH & PENOE and T. J. WALSH, for defendant in error.

GARNETT, P. J. In his lifetime Jeremiah Scanlan was the owner in fee of the real estate in controversy in this case, known as No. 424 State street, in Chicago, subject to three trust deeds thereon to L. C. P. Freer, which secured separate loans made to Jeremiah in the years 1874, 1875 and 1876. Default having been made in the payment of interest due on the loans, Freer advertised and sold the premises to Nathan M. Freer, his son, in pursuance of the power given by one of the trust deeds, and conveyed the same to Nathan by trustee's deed, dated March 4, 1879. Nathan did not claim that he acquired the absolute title to the property, free from the equity of redemption, and, in fact, the record satisfactorily leads to the conclusion that after the sale the relation of mortgagor and mortgagee, between Jeremiah and the owner of the indebtedness, continued.

For the purpose of saving the property, Jeremiah arranged with his brother, Timothy H. Scanlan, to advance the amount necessary to make the redemption and take the title as security. To carry out this plan Timothy paid to the holder of the indebtedness a part thereof in cash and secured the rest, which he has since paid. At the same time Nathan conveyed the property to Timothy by quit-claim deed, dated May 1, 1879, and Jeremiah and his wife by quit-claim deed, dated May 2, 1879, also conveyed the same to Timothy, but no consideration was received by them for the deed.

In the fall of 1880 Jeremiah Scanlan died, leaving him surviving his widow, Ann Scanlan, and Nellie Scanlan, then in her nineteenth year, and Edward J. Scanlan, then in his seventeenth year, his heirs at law. This litigation arises out of a bill filed July 14, 1887, by Edward and Nellie against Timothy and Ann Scanlan, in which they allege that the relation of mortgagor and mortgagee, created as aforesaid, still continues, and pray that they be allowed to redeem.

Ann Scanlan filed a cross-bill praying that her dower right be set off to her. To the bill and cross-bill Timothy set up as a defense that, in October, 1879, he agreed upon a settlement with his brother, and that they fixed upon the value of the property, and upon the several amounts he had advanced

as loans to Jeremiah, and for taxes, assessments and repairs, and that he then paid the latter the difference (\$2,100) between the agreed value of the property and the amount of the advances. We are of opinion that the evidence fairly proves that in October, 1879, a settlement was agreed upon between these brothers, by which Timothy was to pay Jeremiah the sum of \$2,100 for whatever interest in the property remained in the latter and his wife; that he, Jeremiah, then signed a receipt in full for all claims against the property in consideration of the sum of \$2,100, and that his wife, being unable to write, signed her name by making her mark thereto; that at the time she so made her mark a draft for \$2,100 was handed to her by Timothy's agent, and the same was passed over by her to her husband, who in regular course collected the amount therefor.

Mrs. Scanlan denies having signed the receipt, but Nathan M. Freer testifies that he prepared such a receipt in the presence of the two brothers, one of whom (but he does not remember which) took it and said they were going to get Mrs. Scanlan to sign it. Marcus I. Stearns, agent of Timothy, testified that in the fall of 1879, he took a paper to Mrs. Scanlan to be signed and that she did sign it in his presence. He thinks the same paper was signed by her husband, and when she signed it he handed to her a piece of New York exchange in consideration thereof. There is no pretense that any other paper was signed by either of them in the fall of 1879 at the request of Stearns. If it was not the receipt in question which she signed, what was it? The paper itself is lost, having probably been destroyed by fire, but the draft for \$2,100, dated October 18, 1879, indorsed by Jeremiah Scanlan, was produced in evidence. Soon after the making of the receipt Timothy took exclusive possession of the building on the premises, expelling therefrom his brother and family. He has since at all times maintained his hostile claim, and though Mrs. Scanlan must be presumed to have known she had a right of dower in the equity of redemption, unless she had released it, no step was taken by her to assert her supposed interest until November 16, 1887, when she filed her cross-bill in this case.

If the facts and circumstances established by the positive testimony, tending to show the release, were in need of support, we think the long delay and acquiescence in Timothy's adverse assertion of ownership, go far toward inducing the conviction that the settlement and release were made as claimed.

A formal deed is not required for the release of an equity of redemption, when the mortgage is made in the form of an absolute conveyance. *Seymour v. Mackey*, 126 Ill. 341.

In such cases if subsequent transactions between the mortgagor and mortgagee make it inequitable to allow redemption, equity will refuse its aid. *West v. Reid*, 55 Ill. 242.

The consideration for the release appears to have been all received by Jeremiah, but that can make no difference as to the effect of the transaction. Payment of a consideration to a wife for a release of her dower by joining with her husband in a conveyance, may sometimes happen, though it is very unusual. But making the validity of her release depend on the receipt of a consideration by her personally would be an unfortunate doctrine.

The statute, Chap. 68, has removed the disability of the wife, except in the instances there specified, and no reason is perceived why she may not part with her property rights for a consideration paid to her husband alone. The charge that the consideration for the release was inadequate is not sustained. The evidence was ample to warrant the court in finding that there was no such disparity between the value of the equity of redemption and the amount paid therefor as to require the interference of equity in behalf of the mortgagor or his heirs. The decree is affirmed.

Decree affirmed.

JOHN TROTTER

V.

CITY OF CHICAGO.

*Municipal Corporations—Ordinances—Parades and Processions—
"Salvation Army"—Superintendent of Police—Discretion of.*

1. The city council of the city of Chicago has no power to regulate or prohibit parades or processions as such.
2. Parades or processions through streets are not nuisances.
3. A city council having the power to prohibit or regulate, must exercise the same by ordinance, and can not delegate it to the discretion of the chief of police.
4. The right of the "Salvation Army" to parade is equal to that of any other organization.
5. An ordinance which operates partially is void.

[Opinion filed May 29, 1889.]

APPEAL from the Criminal Court of Cook County; the
HON. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. McMURDY & JOB, for appellant.

Mr. C. A. KNIGHT, for appellee.

MORAN, J. Appellant was arrested and fined on a charge of "parading and marching in procession upon the public street without having first obtained a permit." The proof was that appellant with fourteen other persons marched through the streets with various kinds of musical instruments, drums, cymbals, banners, flags and regalia; that those composing said procession were members of the "Salvation Army," a religious body, that marches to attract others to its place of worship, and that neither appellant nor his companions had a license or permit to parade from the superintendent of police.

The ordinance under which appellant was prosecuted is as

follows: Section 1. That no parades or processions shall be allowed upon the streets of the city, nor shall any open air public meeting be held upon any ground abutting upon any street or avenue of the city, until a permit therefor shall first be obtained from the police department, under a penalty of not less than \$25 nor more than \$100. Such permit shall be issued without fee by the superintendent of police, and shall, in the case of parades or processions, specify the route to be followed upon the streets of the city.

The only clauses of the general incorporation act which, it is contended, authorize the city council to enact such an ordinance, are the provisions conferring powers to regulate the use of the streets and public grounds, and are as follows: "To regulate and prohibit the exhibition or carrying of banners, placards, advertisements or hand-bills in the streets or public grounds or upon the sidewalks."

"To declare what shall be a nuisance and to abate the same; and to impose a fine upon parties who may create, continue or suffer nuisances to exist."

"To prevent and suppress riots, routs, affrays, noises, disturbances, disorderly assemblies in any public or private place."

"To prevent and regulate the rolling of hoops, playing of ball, flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets or on the sidewalk, or to frighten teams and horses."

"It is a general and undisputed proposition of law, that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power denied." 1 Dillon, Mun. Cor., Sec. 89.

We are unable to find, in any of the provisions of the charter above quoted, or in any other provision thereof, that

the power is granted to the city council to regulate or prohibit parades or processions as such. It is nowhere given in express words nor can we conclude that it is granted by necessary implication.

It may be that under the power to regulate the use of the public streets, would be found the power to declare that certain streets or portions of the streets should not be used by processions at all, or during certain hours of the day or night; but such ordinance would have to be impartial and general, and not be so drawn as to make it possible that discrimination should be made in enforcing it, against some, and in favor of others, and in order to be sustained, it would have to appear that it was designed to subserve some public necessity or convenience.

The ordinance can not be said to be a regulation of the use of the streets. It is, in effect, a prohibition of the use of the streets for what has always been a common and ordinary use of them in cities—a use practically inseparable from the aggregation of large populations, in modern urban communities. Processions and parades through the streets are not nuisances, and have never been so considered. True, a procession may become disorderly or riotous, and degenerate into a mob, or a parade may be so conducted in the banners which it displays, or the objects and purposes of its march, or the disorderly and abhorrent noises in which it indulges, as to invite a breach of the peace, or to render itself a nuisance, but this would be under exceptional circumstances, and the individuals so disporting themselves would be subject to punishment, and are thus under the restraint of law.

Under a popular government like ours, the law allows great latitude to public demonstrations, whether religious, political or social, and it is against the genius of our institutions to resort to repressive measures which have a tendency to encroach on the fundamental rights of individuals or of the general public.

In considering the validity of an ordinance similar to the one in question, the Supreme Court of Michigan, speaking through Campbell, C. J., said: "It has been customary from

time immemorial, in all free countries and in most civilized countries, for people who are assembled for common purposes to parade together by day, or reasonable hours at night, with banners and other paraphernalia, and with music of various kinds. These processions for political, religious and social demonstrations are resorted to, for the express purpose of keeping up unity of feeling and enthusiasm, and frequently to produce some effect on the public mind by the spectacle of union and numbers. They are a natural product, and exponent of common aims and valuable factors in furthering them. They are only found to any appreciable extent in places having collected inhabitants, for spectators are generally as important as members. They are among the incidental conditions of city life, and are as much to be expected, on suitable occasions, as any other public meeting, and not necessarily more dangerous." *Matter of Frazer*, 63 Mich. 396.

There is no power granted to the common council which would authorize it to take from the people of this city a privilege exercised freely in all communities throughout the land ever since the organization of the government. To uphold such an ordinance the power to pass it must be clear and controlling, and when there is doubt as to the power, the question must be resolved in favor of the greatest liberty and against repression or arbitrary restraint. But if the council has the power to regulate or prohibit processions in the streets, this ordinance is not a proper exercise thereof. The power, if it exists at all, must be exercised by the council by ordinance, and can not be delegated to the discretion of the chief of police. *Kinnundy v. Mahan*, 72 Ill. 463; *City of East St. Louis v. Wahrung*, 50 Ill. 31.

"This by-law is unreasonable because it suppresses what is generally perfectly lawful, and because it leaves the power of permitting or restraining processions and their courses, to an unregulated official discretion, when the whole matter, if regulated at all, must be by permanent, legal provisions operating generally and impartially." *Matter of Frazer*, *supra*.

Said the Supreme Court of Kansas, speaking of a like provision in an ordinance: "It might be proper, on account of the peculiar conditions of affairs in a city, that street parades should be confined to certain streets, or should be conducted within certain hours of the day, or should be forbidden in the night time, or that the police department should have some previous notice, or that there should be other reasonable regulations respecting them, justified by such a condition that it would be apparent that regulation and not prohibition, was the object of the ordinance; because the power can not extend to prohibition, for the very essence of regulation is the existence of something to be regulated. * * * It is not a reasonable regulation to vest the power arbitrarily in the mayor to grant or refuse permission to any association of persons, combined for legal and meritorious purposes to parade the streets with music." *Anderson v. City of Wellington*, 19 Pac. Rep. 719; *Baltimore v. Radecke*, 49 Md.

The ordinance in question applies to all processions, charitable, religious, political or otherwise. It can not be other than partial and discriminating in its practical operation when the granting or refusal of the permit is left to the discretion of one man. No man is so just or impartial as to be safely invested with such power. One chief of police might refuse the Salvation Army; another might exercise his power to repress the parades of the Ancient Order of Hibernians; another might render the members of the Masonic organization liable to a fine for marching in the funeral procession of a deceased brother, and still another might forbid the progress through the streets of a political organization.

These may be extreme suppositions, but they are of possible occurrence. It must be remembered the right of the Salvation Army is equal to any of the others, and though that body may appear grotesque to some, and be the subject, perhaps, of unjust ridicule, that can be no reason why the liberties and rights of its members should not be jealously protected. There can be no true liberty where an individual is clothed with arbitrary power; unregulated discretion is tyranny.

Bryton v. Marston.

The ordinance may, and most likely does, operate partially, and is unjust, unreasonable and therefore void.

The judgment of the Criminal Court will be reversed.

Judgment reversed.

GARY, J., dissenting. I think under the power given to cities to regulate the use of streets, so much of the ordinance as relates to parades and processions upon the streets is valid; that in the nature of things the occasions, when they ought to be prevented or permitted, can not be known and provided for in advance by general ordinance; that a discretion must be lodged somewhere; and that the superintendent of police charged with the direction of the physical force for the preservation of peace and order in the city, is a proper officer to be vested with that discretion.

FREDERICK BRYTON ET AL.

V.

LAWRENCE MARSTON.

*Sales—Play — Written Contract — Conditions—Breach — Forfeiture—
Damages—Penalty.*

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1. The language of the parties to a contract touching the construction of a clause therein stating the damages to be paid in case of the breach thereof, is not controlling, and if a strict construction of the terms used would result in oppression or in contravening the intention of the parties the courts may inquire into the damages sustained and make compensation for such injury the measure of damages for the breach.

2. Where a party agrees in writing to do several things, one of which is to pay a sum of money, and in case of a failure to perform any or either of the stipulations set forth, to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty, and in the absence of evidence of actual damages in an action for a breach of the agreement, nominal damages only may be recovered.

3. In a suit upon a contract of sale of a play for breach of conditions thereof, it being provided that the agreement of sale should become null and void in case the same was not produced, and that it should be returned, this court holds that for the failure to so return, a recovery can be had of its reasonable value.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

An action of assumpsit was brought by appellee against appellants upon the following contract:

"Articles of agreement made the 27th day of August, 1884, between Nate Salsbury and Frederick Bryton, of the city, county and State of New York, parties of the first part, and Lawrence Marston, of the same place, party of the second part, witnesseth as follows: The parties of the first part agree to purchase from the party of the second part a certain original play or drama, written and composed by the said party of the second part, which said play or drama was duly copyrighted with the Librarian of Congress of the United States at Washington, D. C., under the title of 'Walton's Home,' by the said party of the second part, in the year 1884. And the said party of the second part agrees to sell to the parties of the first part all the right, title and interest whatsoever to the said drama entitled 'Walton's Home,' and the manuscript and copyright thereof, for the sum of \$3,000, good and lawful money of the United States, upon the following conditions: The said parties of the first part shall, upon the delivery to them of the manuscript and acting parts of said play or drama entitled 'Walton's Home,' pay to said party of the second part the sum of \$200, and the further sum of \$10 per night for each and every night of the actual performing in any theater of the said play or drama, and the sum of \$5 for each and every afternoon and matinee performance of the same, until the said sums shall aggregate the sum of \$3,000, when the said play or drama shall become the absolute property of the said parties of the first part. That the said parties of the first part shall have the exclusive right to make any and such alterations in the said play or drama, entitled 'Walton's Home,' as they shall deem meet for the proper production of the same. That they shall use the name of the party of the second part as the author of the said play or drama, and print the same upon their play bills and advertisements.

"That the said party of the second part, his heirs and assigns, covenants and agrees to and with the parties of the first part, their heirs and assigns, that he, the party of the second part, his heirs and assigns, will not at any time hereafter engage, directly or indirectly, with any person or persons, other than the said parties of the first part, their heirs and assigns, in producing in any manner, at any theater or elsewhere, the said play or drama entitled 'Walton's Home,' or in selling or disposing of the same. And the said party of the second part, for himself, his administrators and assigns, doth promise, covenant and agree to and with the parties of the first part, their heirs and assigns, by these presents, that they, the said parties of the first part, their administrators and assigns, shall and lawfully may, from time to time, and at all times hereafter, peaceably and quietly have, hold and possess and enjoy the said play or drama, entitled 'Walton's Home,' hereby sold, or intended to be, without the lawful hindrance or molestation of the said party of the second part, his administrators and assigns, or of any person or persons whatsoever, by or with his or their act, consent, privity or procurement. That the said parties of the first part, their heirs and assigns, bind themselves to and with the said party of the second part, his administrators and assigns, that they will produce the said play or drama of 'Walton's Home' before the public on or before the 1st day of October, 1885, or in failure thereof, then this agreement of sale shall become null and void, and all moneys paid by the said parties of the first part to the party of the second part shall be forfeited to him, and the manuscript of said play shall be returned. That the said parties of the first part, after the production of said play or drama, entitled 'Walton's Home,' shall pay to the party of the second part, his administrators and assigns, the said sum of \$10 for each and every night performance, and said sum of \$5 for every afternoon or matinee performance, each and every week, by post-office order, or in such other way as shall be mutually agreed upon. And it is expressly understood that the stipulation of sale aforesaid are to apply to and bind the administrators and assigns of the respective

parties, and in case of failure to perform any of the agreements of said sale, the parties bind each unto the other in the sum of \$5,000, as fixed and settled damages to be paid by the failing party or parties.

"In witness whereof we have set our hands and seals the day and year first above written.

(Signed) "SALSBURY & BRYTON. [SEAL,]
"LAWRENCE MARSTON. [SEAL.]"

To the declaration there was a plea of the general issue, and the case was tried by the court without a jury.

Plaintiff's evidence showed that he was paid the \$200 mentioned in the contract, and nothing more, and that defendants had never produced the play, and had not returned the manuscript to him.

The court found for the plaintiff and assessed the damages at \$5,000, to which appellants duly excepted, and from the judgment entered on such finding this appeal is prosecuted.

Mr. A. B. JENKS, for appellants.

Messrs. CUNNINGHAM & KEILY, for appellee.

MORAN, J. The question presented is whether the clause of the contract which provides that "in case of failure to perform any of the agreements of said sale, the parties bind each unto the other in the sum of \$5,000, as fixed and settled damages, to be paid by the failing party or parties," is to be treated as creating a penalty or as an agreement liquidating the damages to be recovered in case of breach.

It is well settled that the language used by the parties in framing such a clause in a contract is not controlling; that if a strict construction of the terms used would result in oppression, or in contravening the intention of the parties as gathered from the whole instrument, then the use of such words as "liquidated," or "fixed and settled" damages will not prevent the courts from inquiring into the actual damages sustained, and making compensation for such actual injury, the measure of damages for the breach.

When we examine the contract in this case, we find that there is an agreement by the appellants to pay \$10 for every night performance and \$5 for every afternoon performance of the play, till the sum of \$3,000 should be paid, and that said payments should be made each week by post-office order or in some other way to be agreed upon.

Now the settled damage clause secures the performance of this agreement to pay these small sums of money each and every week, for the \$5,000 is to be paid "in case of failure to perform any of the agreements of said sale." There can be no doubt that the sum to be paid and the time and manner of payment are essential and material "agreements of said sale."

So far as the damage-clause applies to the breach of such parts of the contract, it is to be construed as a penalty; for it is settled by a substantial concurrence of the authorities that "where, by the terms of a contract, a greater sum of money is to be paid, upon default in the payment of a lesser sum, at a given time, both courts of law and equity will hold the provisions for the payment of the greater sum to be a penalty. And even where the parties stipulate for the payment of a sum certain on default of performance of an agreement, such stipulation will be treated as a penalty if the damages are not difficult of ascertainment." *Tiernan v. Hinman*, 16 Ill. 400; *1 Sutherland on Dam.*, 497; *Scofield v. Tompkins*, 95 Ill. 190.

There is in the contract, however, a stipulation for the breach of which damages would be uncertain and difficult to fix; that is the agreement to use the name of the party of the second part as the author of the play, and print the same upon their play bills and advertisements. This seems to be an unimportant and merely incidental stipulation, and it is difficult to conclude that it was the true meaning and intent of the parties to make \$5,000 the measure of its breach. But the fact that the breach of it as well as the breach of the money agreements in the contract, is covered by the damage clause, does not compel the construction of said clause as liquidating the damages. The rule is that "where a party agrees to do several things, one of which is to pay a sum of money, and in case of a failure to perform any or either of

the stipulations agrees to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty; and being a penalty in regard to one of the stipulations to be performed, is a penalty as to all." *Cotheal v. Talmadge*, 9 N. Y. 551; 1 Sutherland on Dam., 521.

It follows that under the terms of the contract the agreement to pay \$5,000 must be treated as a penalty and that appellee, having introduced no evidence on the trial as to actual damages, was entitled to recover only nominal damages for breach of contract. As the case must be remanded for another trial, we will notice the clause of the agreement requiring the production of the play before the public, on or before October 1, 1835.

On a failure to so produce, the parties provided that the agreement of sale should become null and void, and the play should be returned. The play not having been produced, the terms of the agreement left none of the stipulations of it operative between the parties on which to maintain an action, except that for the return of the play. For the failure to so return, appellee can recover what the manuscript shall be shown to be reasonably worth.

The judgment of the Superior Court will be reversed and the case remanded.

Reversed and remanded.

W. J. HAMMOND & SONS (LIMITED)

V.

THE CRAGIN MANUFACTURING COMPANY.

*Sales—Damaged Iron—Correspondence—Uncertainty as to Meaning of
—Evidence—Instructions.*

1. Upon a contention involving the meaning of certain correspondence relating to the sale of a lot of damaged iron, this court holds that the instructions given in behalf of plaintiff touching the intention of the parties in interest were less favorable than they were entitled to, and that proper instructions as to damages were not given.

Hammond v. Cragin Mfg. Co.

2. The meaning of correspondence is a question for the court, unless it appears that the words used are to be considered in other than the ordinary sense.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ABBA N. WATERMAN, Judge, presiding

Mr. L. S. HODGES, for appellant.

Mr. W. A. MONTGOMERY, for appellee.

GARY, J. In July, 1887, as this record shows, the appellants, at Pittsburgh, Pa., had on hand a quantity of sheet iron and steel that had been damaged by a fire that consumed their mill.

The manager of the appellees negotiated with them to buy it. It was not in good shape to be examined, being among the ruins of the mill, except a small part that had been removed to a shed, but he examined it as carefully as he could. He asked the appellants if they had any memoranda, and they said they had a memorandum on which they computed their insurance. They could not give him a copy, but permitted him to have a copy made at his own expense, and a representative of the appellants assisted him in comparing the copy with the original. He testified that he then made to the appellants an offer of one and one-fourth cents per pound, delivered in Chicago, for the entire lot of iron, as per that memorandum; and told them he would hold the offer open forty-eight hours. There was a reservation of some iron, but no notice of that need now be taken. It does not affect the questions to be decided. Then followed this correspondence:

Copy of telegram:

PITTSBURGH, PA., July 29, 1887.

To W. P. CRAGIN:

Care Cragin Mfg. Co., Chicago, Ill.

We accept your offer for the sheet iron and sheet steel we named you. Will commence shipping immediately by B. & O. road. Send formal order.

W. J. HAMMOND & SONS (Limited).

Copy of letter:

PITTSBURGH, July 29, 1887.

W. P. CRAGIN, Esq.:

Acc't Cragin Mfg. Co., Chicago, Ill.

Dear Sir:—We have just telegraphed to you the following: viz.: "We accept your offer for the sheet iron and sheet steel we named you. Will commence shipping immediately by B. & O. road. Send formal order." Which we now confirm. Please remit for the goods as rapidly as we ship them.

Yours truly,

W. J. HAMMOND & SONS (Limited).

By S. M. REYNOLDS.

In answer to which appellees wrote:

CHICAGO, July 30, 1887.

HAMMOND & SONS:

PITTSBURGH, PA.

Gents:—Ship us to Chicago all the sheet iron and steel that is bundled, as per your mem. given our W. P. Cragin. Price (1½) one and one-quarter cents, delivered in Chicago. Terms 10,000 cash, balance notes. Our bank says we can probably have about all cash if it does not go over \$15,000. We are not to have any of the iron that had not been annealed, or bundled. We may telegraph you to ship it to our factory, but we can alter that of first cars after we get the bills of lading here. We have not got storage fully arranged yet. If it can be arranged send a gauge in a car, but be sure and promptly send exact mem. of contents of each car. We have received your telegram accepting this offer.

Yours truly,

CRAGIN MFG. CO.

W. P. CRAGIN, Pres't.

The appellees claimed that as the appellants accepted and shipped upon this letter; the terms of it constituted the contract between them; that under that contract the appellees were entitled to all that the memorandum said was bundled and that the quantity shipped fell short 251,258 pounds; that it was worth in Chicago two and seven-tenths cents per pound and they had lost thereby \$3,434.75.

On the part of the appellants it was claimed that under the letter from the appellees, the appellees were not bound to accept, and could not claim any that had not been "bundled" in fact, however it might be represented upon the memorandum, and gave evidence that they sent all of that, except a trifling quantity shipped by mistake to another party, about which it is fair to suppose there would never have been any trouble between these parties.

The briefs on both sides agree that "bundled" means several sheets put together with two or three iron bands around the whole; that, in fact, it is what Webster defines a bundle to be—a number of things bound together. The sentence in the letter, "We are not to have any of the iron that had not been annealed or bundled," must have had some meaning when it was written, which the writer supposed the receiver would understand. It was written with reference to what had passed through a fire, presumably destroying the apparatus by which annealing was done. "That had not been annealed or bundled," when? Before some event, manifestly, which the appellants would understand that phrase to refer to. By it the appellees excepted from the general words of the first two lines of their letter, all that the memorandum showed to be "bundled," which, in fact, had not been so treated. And appellees' letter did not refer to any verbal preceding negotiations. Its concluding words are, "We have received your telegram accepting this offer"—not any former offer. The case was tried in the Circuit Court upon the theory that the appellants were bound—considering the correspondence as containing the contract, as was no doubt correct—to deliver to the appellees all that was "bundled as per your mem.," disregarding the exception in the subsequent sentence. The appellants sued for the unpaid balance for what had been shipped, \$4,442.01, which the appellees admitted to be correct.

The appellants asked these instructions:

1. The jury are instructed that the word "bundled," as used in the defendant's letter of July 30, 1887, must be held to have been so used in its plain, natural and obvious meaning, unless the jury shall find from the entire evidence in this case

that the plaintiff and defendant both intended to use it in a limited, or technical and special sense.

2. The jury are instructed that the letters and telegrams set out in the defendant's bill of particulars did not require the plaintiff to deliver to the defendant any iron which had not then been actually bound in bundles, unless the jury shall find from all the evidence in this case that the word "bundled," as used in said letter of July 30th, was intended by both plaintiff and defendant to be so used in a limited and technical sense. Therefore, if the jury find from the evidence that the plaintiff did deliver to defendant, as agreed, all the iron which had been so bound in bundles, then in the absence of proof that the word "bundled" was intended by plaintiff and defendant to be used in a limited and technical sense, the defendant can not recover in this action.

3. The court instructs the jury that if they find from the evidence that the plaintiff agreed to deliver to the defendant certain iron which was "bundled," they must interpret the word "bundled" in its plain, natural and ordinary sense, unless they find from all the evidence in the case that it was intended by both plaintiff and defendant that the word "bundled," so used, should bear a different and special or technical meaning; therefore, if they find from the evidence that plaintiff did deliver, as agreed, all the iron that was "bundled," in the ordinary meaning of the word, in the absence of proof that it was mutually intended to use the word in a limited or technical sense, the defendant can not recover.

There was no evidence upon which to leave to the jury that "bundled" iron meant anything else than iron in bundles, nor any dispute that the mode of putting it in bundles was to put together several sheets and put two or three iron bands around them.

The instructions were less favorable than the appellants were entitled to. The meaning of the correspondence was a question for the court, unless there had been evidence of words being used in a sense differing from the common one. The jury should have been told that the appellees were not entitled to any damages for the non-delivery of any iron that

C., B. & Q. R. R. Co. v. Mehlsack.

had not been in fact bundled before the letter of July 30th was written. The appellees were allowed upon their theory all the damages they claimed, and the appellants only recovered the difference.

From that judgment they appealed. The judgment must be reversed and the cause remanded.

Reversed and remanded.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
v.
FRANK MEHLSACK.

Railroads—Personal Injuries—Relation of Passenger—Standing upon Platform—Stealing Ride—Practice—Opening Address—Discretion.

1. This court will not reverse the finding of a jury unless satisfied that it is against the manifest weight of the evidence, or is the result of passion or prejudice, or unless some error of law has intervened.

2. The failure of a trial court to require counsel for plaintiff to make an opening address to the jury after the evidence is closed and before counsel for the defendant makes his argument, can not be complained of, in view of the diverse practice in this regard.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. JOSEPH E. GARY, Judge, presiding.

Mr. GEORGE WILLARD, for appellant.

Messrs. JOSEPH S. KENNAED, JR., and BRANDT & HOFFMAN,
for appellee.

MORAN, J. This is an appeal from a judgment rendered against appellant for injuries received by appellee while riding on the steps of a car of one of appellant's passenger trains.

The first point argued by appellant is that the verdict is against the evidence and law of the case. It is claimed that

the evidence shows that appellee jumped upon the steps of the car for the purpose of stealing a ride; that he did not, and did not intend to pay his fare, and therefore that the relation of passenger was not created between himself and the company, and it is further said that if he was a passenger, he was guilty of a lack of ordinary care for his own safety in standing upon the platform or the steps; that if he had been inside the car, he would not have been injured.

There is, no doubt, support in the evidence for the inference that appellee intended to steal a ride, but he testified that he was ready and willing to pay his fare, and expected to do so, but that the conductor did not come to him for it. As to his standing on the platform, he testifies that the car was crowded, that there was no room to stand inside and that several others besides himself were obliged to stand on the platform. It was for the jury to pass on this conflict and to draw the correct inference from all the facts and circumstances in evidence, and when their conclusion as to the facts has received the approval of the trial judge, an appellate court can not reverse the finding unless satisfied that it is against the manifest weight of the evidence, or is the result of passion or prejudice on the part of the jury, or unless some error of law has intervened.

Appellant contends that there are errors of law in the record. After a careful examination of all the rulings on evidence and the instructions given and refused, and consideration of counsel's argument and authorities cited, we are of opinion that no error of law was committed which authorizes this court to reverse.

It would serve no useful purpose to discuss the various points in detail. Upon the point that the counsel for plaintiff should have been required to make an opening address to the jury after the evidence was closed, before counsel for defendant made his argument, the writer is in sympathy with the contention of appellant. I am of opinion that plaintiff's counsel should be compelled to make his main speech to the jury (if he desires to argue his case at all) at the close of the evidence, and that if he makes any address after defendant's

Youngs v. Youngs.

counsel has made his argument, he should be confined substantially within the limits of reply. This seems to me to be the natural, as it is manifestly the fair course to pursue. The just test of an argument in support of the affirmative is to submit it to the criticism and analysis of a negative argument, and as the object of all discussion before the jury is, or ought to be, to arrive at the truth, the order of argument ought to be such as would best promote that end. In practice there has been and is no uniform rule, at least in Cook county, upon this subject, the matter being left to the discretion of the trial judge; and, while I think the court should have required plaintiff's counsel to open to the jury, and should have confined him in his closing address to a reply to the argument of defendant's counsel, still, in view of the diverse practice, it is impossible to say that the course pursued by the court was an abuse of discretion.

There is no error in the record, and the judgment will therefore be affirmed.

Judgment affirmed.

GARY, J., takes no part in determining this case.

MARIE A. YOUNGS

v.

PHINEAS R. YOUNGS.

Divorce—Intoxication—Morphine Habit—Cruelty—Sexual Intercourse—Immoderate Requirement—Condonation.

1. Proof of the immoderate and habitual use of morphine will not sustain the charge of habitual drunkenness in a bill for divorce.

2. The compulsory participation by a wife in excessive sexual intercourse will not amount to cruelty unless the persistence of the husband is against her will, he knowing that her bodily health will suffer therefrom.

3. Upon a bill by a wife for divorce upon the ground, among other things, of extreme and repeated cruelty, this court holds, that the acts complained of were condoned by her.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Messrs. C. F. LOESCH and GEORGE DRIGGS, for appellant.

Messrs. A. J. HOPKINS, N. J. ALDRICH and F. A. THATCHER, for appellee.

MORAN, J. This is a bill for divorce. Two statutory grounds for divorce are alleged in the bill. Habitual drunkenness and extreme and repeated cruelty.

The evidence introduced in support of the first ground was, that appellee was in the habit of taking morphine by hypodermic injections, and that he would become stupid and helpless from the effects of it, and appear like one intoxicated, and conduct himself in a drunken manner, and that he persisted in the use of the drug, and while he tried to reform, seemed unable to do so.

The word "drunkenness" used in our statute is commonly and generally understood to mean that intoxication which results from the excessive drinking of alcoholic liquor, and to show one guilty of habitual drunkenness it must be proved that drinking to excess is indulged in so frequently as to become a fixed habit with him. Words used in a statute must be taken in their plain, ordinary and usual sense. The intoxication which results from the excessive use of opiates, is not understood or described by the word "drunkenness" in the divorce law, hence proof of the immoderate and habitual use of morphine, was not sufficient to sustain the charge of habitual drunkenness made in the bill. *Barber v. Barber*, 14 Law Reporter, 75; 1 Bishop on Mar. & Div., Sec. 813.

In support of the charge of extreme and repeated cruelty there is evidence of striking and harsh treatment, but the acts of violence seem to have occurred when the appellee was under the influence of morphine, and usually in resisting the efforts of appellant to take the drug away from him.

There is also evidence tending to show that he sometimes treated the child cruelly by beating it, but the proof does not

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show that this was done for the purpose of annoying or maliciously harassing appellant. As further evidence of cruelty appellant complains that she was compelled by appellee to submit to excessive sexual intercourse. This will not amount to cruelty unless it is shown that it is persisted in by the husband against the will of the wife, and when he knows that the act is injurious to her bodily health. *Shaw v. Shaw*, 17 Conn. 189.

As to the acts of personal violence and cruel conduct toward appellant, perhaps if they had continued until the separation, and she had been compelled to leave for such violence, there might be enough to warrant a divorce; but we are of opinion that the proof in this case shows a condonation of said acts of cruelty, and that the chancellor was right in so holding.

The last act of cruelty appellant testifies occurred in December, 1886, and she continued to live and cohabit with appellee till March, 1887. There is no evidence of subsequent abusive treatment or ill usage. 2 Bishop on Mar. & Div., 50, 51; *Farnham v. Farnham*, 73 Ill. 500.

The decree of the Circuit Court will be affirmed.

Decree affirmed.

HENRY SIEGEL ET AL.

V.

CHICAGO TRUST AND SAVINGS BANK.

Negotiable Instruments—Notes—Consideration—Failure of—Assignment.

This court holds a certain instrument calling for the payment of money to an advertising company to be a promissory note, in so far as to enable an assignee taking the same for value before the time for the consideration to commence had arrived, and with no notice that it was likely to fail, to recover thereon.

[Opinion filed May 29, 1889.]

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APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. JOHN C. RICHBERG, for appellants.

Messrs. FRANK J. SMITH & HELMER and FRANK IVES, for appellee.

GARY, J. The single question in this case is whether instruments in this form—

“Form 8. DALZIEL’S RAILWAY ADVERTISING.

“\$300.00.

CHICAGO, March 5, 1887.

“On July 1, 1887, we promise to pay D. Dalziel, or order, the sum of three hundred dollars for the privilege of one framed advertising sign, size one end of each of 159 street cars of the North Chicago City Railroad Co., for a term of three months, from May 15, 1887.

“No.

SIEGEL, COOPER & Co.”

are promissory notes, so that an assignee may recover on them, though the consideration failed; the assignee having taken them before the time for the consideration to commence had arrived, for value, and with no notice that the consideration was likely to fail.

As an original question, if there were no authority, it would seem clear that business interests would require that the mass of commercial paper made for the purpose of procuring capital for conducting business, by way of advances upon consignments made or to be made, or upon contracts to be performed, should be, when such paper is in ordinary forms, held valid and effectual for the purpose for which it may have been made, although parties taking it for value before maturity, and before any failure of consideration, had notice of why it had been made. What authority there is upon the subject supports that principle. *State National Bank v. Cason*, 39 La. Ann. 865; *Davis v. McCready*, 17 N. Y. 230.

Siegel v. Chicago Trust and Savings Bank.

Why should it make any difference whether that notice of what the consideration of the paper is, comes to the assignee on the face of the paper, or extrinsically? The cases, *Goodloe v. Taylor*, 3 Hawks. (N. C.) 458, and *Stevens v. Blunt*, 7 Mass. 240, (the latter approved upon another point in *McCarty v. Howell*, 24 Ill. 341,) hold, that notes, payable at a certain day, or when the payee has completed a building, are, in the hands of the assignee, absolutely payable when the day arrives, whether the building is done or not. Though the cases do not discuss the question whether from such language the consideration appeared on the face of the notes, it would seem to have been taken for granted that it did.

But where a similar instrument was payable at a day fixed, "upon completion of," etc., it was properly held that it was only a contract to pay when the work was done; the word "upon" introduced a condition. *Chandler v. Carey*, 31 N. W. Rep. (Mich.) 309; and in *Considerant v. Brisbane*, 14 How. Pr. 487, that the instrument payable July 1, 1856, "for which I am to receive stock," was only an agreement. In that case the delivery of the consideration and the payment were to be simultaneous acts, which may be sufficient to distinguish it from the present, where the consideration covers a period of three months, and the payment is to be made before that period has elapsed.

There could have been no motive for making this paper to Dalziel or order, two months and ten days before the consideration was to commence, unless that he might use it in his business in some way, and the most ready way to use it was to discount it or pledge it as collateral. The use of the words "or order" adds nothing to the legal effect of the paper, but they do serve to show what the parties thought was the legal effect. There is nothing in the parol testimony affecting the question at issue. The ruling of the Circuit Court that the instruments are promissory notes, was correct.

Judgment affirmed.

JACOB CONRAD
v.
BERNARD KLOEPFER.

AUGUST TRAPP
v.
SAME.

Practice—Trial by the Court.

1. The finding of the trial court upon evidence heard orally should have as much weight as the verdict of a jury.
2. In such case the fact that the evidence was conflicting will not warrant this court in awarding a new trial.
3. Error can not be assigned upon rulings which had no influence in producing the findings of the court.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. MILLARD F. RIGGLE, for appellants.

Messrs. JOHN A. MURPHEY, JR., and LYMAN & JACKSON, for appellee.

GARNETT, P. J. On simple issues of fact, the trial judge, to whom these cases were submitted without a jury, found adversely to appellants, who were plaintiffs below.

By a uniform rule, the finding of the court, upon evidence heard orally, as in this case, should have as much force as the verdict of a jury. *Wood v. Price*, 45 Ill. 435; *Baker v. Rockabrand*, 118 Ills. 370; *Nimmo v. Kuykendall*, 85 Ill. 476.

On the issue of fact, nothing more favorable to appellants can be said, than that the evidence is conflicting, which does not warrant this court in awarding a new trial.

It is clear that the evidence admitted over plaintiffs' objection had no influence in producing the findings of the court, and the rulings can not, therefore, be assigned as error. *Thompson v. McLaughlin*, 66 Ill. 407. The judgment in each case is affirmed.

Judgment affirmed.

Kernan v. Moore.

JAMES KERNAN
v.
RICHARD B. MOORE.

Injunctions—Trespass—Ejectment—Actions of—Boundary Line—Homestead.

Upon a bill to enjoin actions of trespass and ejectment for the encroachment upon the land of another through the erection of a building, the boundary line, which proved to be incorrect, having been agreed upon beforehand by both owners, this court modifies the decree in behalf of the plaintiff, perpetually enjoining the prosecution of such actions in so far as to have the injunction continue only so long as the building in question remains upon its present site.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. EGBERT JAMIESON, Judge, presiding.

Mr. M. J. DUNNE, for appellant.

Messrs. ABBOTT, OLIVER & SHOWALTER, for appellee.

GARY, J. This case leads toward danger. It contravenes the wise policy of the statute of frauds.

The preponderance of the evidence is, and the Superior Court has so found, that in November, 1885, the appellee, being about to build upon a lot adjoining the lot of the appellant, on which he had a dwelling within a few inches of the boundary, they agreed upon a line, to show which pegs were then standing, as the true line; and, relying upon that agreement, the appellee built and encroached upon the lot of the appellant, though not quite to the line so agreed upon, which was several inches out of the way.

The appellant commenced, after the buildings of the appellee were completed, an action of ejectment and another of trespass for such encroachment, and the bill in this case is to enjoin those actions. The decree is that the appellant be per-

petually enjoined from prosecuting the pending actions or any others on account of the encroachment, and awards the appellant \$25 as the value of the land encroached upon. Whatever may be the effect of such an agreement as to boundary (see *Bloomington v. Com. Ass'n*, 126 Ill. 221, and cases there cited), the injunction ought not to be perpetual. In equity and good conscience the appellee should be protected only so far as he has acted under the agreement. He has built a brick dwelling in front and a shed in the rear. The latter is probably, though the character of it does not very plainly appear, a slight structure, easily removed. The injunction should be modified so as to continue only so long as the dwelling does. If, by casualty, that should be out of the way, the appellee, or those succeeding him, can then confine his or their occupation to the right side of the line.

No question of homestead can be brought into this case. No such defense is set up in the answer. *Jenkins v. Greenbaum*, 95 Ill. 11.

So far as the decree makes the injunction perpetual, and only so far, the decree is reversed, and the cause is remanded with directions to modify the injunction so that it shall stop actions for the encroachment so long as the dwelling remains only. The appellant will recover his costs in this court.

Reversed in part and remanded.

STEPHEN MONROE

v.

EDGAR M. SNOW ET AL.

Agency—Sale of Real Estate—Commission—Recovery of—Change in Price—Entry in Cipher—Evidence—Introduction of Books—Res Gestæ—Bill of Exceptions.

1. A bill of exceptions should clearly show the facts in a given case, and the exceptions taken, and if defective through ambiguity, uncertainty or omission, must be construed most strongly against the party who prepared it.

2. In an action by real estate brokers for the recovery of commissions

33	230
41	324
33	230
44	359
44	525
33	230
49	281
49	314
33	230
50	227
50	226

Monroe v. Snow.

the contention being as to whether the price of the land in question had been raised by its owner, this court declines, in view of the evidence, to interfere with the verdict for the plaintiffs.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. NELSON MONROE and LEONARD SWETT, for appellant.

Messrs. ABBOTT, OLIVER & SHOWALTER, for appellees.

GARY, J. This was an action by the appellees to recover commissions as real estate brokers, on a sale made by them of the property of the appellant. The sale was made February 27, 1886, for \$90,000. There is no contest about the fact that the sale was made, and that the purchaser was ready to complete it by paying the purchase money and accepting a conveyance.

It was admitted by appellant as a witness on the trial that at one time the appellees were his agents for the sale of the property at that price, if they could get it, and in a letter of March 3, 1886, in reply to a telegram from them informing him of the sale, he says: "I told you in the fall I would take that price." It is not certain, upon his version of what took place between the parties, that this expression does not refer to the contents of letters written by him in December, 1885. There were two points on which there was a direct conflict between the parties; first, whether the appellant was in the office of the appellees October 31, 1885; and second, whether, February 13, 1886, the appellant raised the price to \$100,000. In reality the only alleged error for this court to consider arises upon the evidence as to the first point. As to all the conflict of evidence upon the other point, the verdict of the jury is an end of the controversy, and the affidavits as to newly discovered testimony, so far as material, only state that Snow, when negotiating the sale, said that at the last interview between the parties, which is fixed by them as February

13, 1886, the appellant had given him verbal authority to make the sale, and that in reply to a suggestion by the purchaser to telegraph appellant, Snow said, "I tell you we have full authority to make this sale, and if we should telegraph to Monroe, he might change his mind." This statement in the affidavit as to verbal authority given February 13, 1886, is not irreconcilable, if it is at all inconsistent, with the version by the appellees of that interview.

As they narrate the conversation it was conducted upon the assumption that such authority was then existing and amounted to a ratification or repetition of it. And the supposed possibility or probability that if telegraphed to, the appellant might change his mind, only shows that the object of the appellees, in conducting a real estate brokerage business, was not benevolent, but the selfish one of earning commissions upon terms previously agreed upon. Whether such evidence would have any influence with another jury can only be a matter of conjecture; it certainly is not evidence of that conclusive character, to let in which, new trials are granted. *Laird v. Warren*, 92 Ill. 204.

And now as to the supposed error on the admission of evidence: First. The facts and the exceptions must be clearly shown by the bill of exceptions. The rule laid down in *Rogers v. Hall*, 3 Scam. 5, that "the bill of exceptions is not to be considered as a writing of the judge but is to be esteemed as a pleading of the party alleging the exceptions, and if liable to the charge of ambiguity, uncertainty or omission, it ought, like any other pleading, to be construed most strongly against the party who prepared it," has never been departed from, but often reiterated, in terms or effect, in subsequent cases, both civil and criminal. *Myers v. People*, 26 Ill. 173; *Lee v. Mound Station*, 118 Ill. 304; *Johnson v. Glover*, 19 Ill. App. 585, are a few among many. This record shows that on the trial Snow testified that in the latter part of December, 1884, the appellant called at the office of the appellees, and asked them to sell the property; that the appellees entered it upon a book which he called by the various names of "record book" "book of original entry" and "sales record

book." That entry was read to the jury without objection. It contained a description of the property; price \$100,000. And in parenthesis, \$95,000 in a private mark of the appellees. The witness then said, "that entry was posted into our sales record book." Then follows:

"Question. Examine this book if you please and identify the place" (handing the book to the witness). To which the defendant then and there objected, which objection was overruled; to which ruling of the court the defendant then and there excepted.

"Question. That is your original entry, you say, in this blotter (referring to the original book)?

"Answer. Yes, sir."

Now upon this exception, it is quite uncertain what book was handed to the witness, whether the same one that had been read without objection or another; and if it was another it seems to have been immediately abandoned, and nothing done by the appellees under the ruling to which exception was taken.

The next exception appears in this way. Snow testified that the appellant came again to the office of the appellees, October 31, 1885, and directed them to change the price from \$95,000 to \$90,000; that the appellees entered that change upon their "sales record book," and then follows:

"Question. Is that the book?

"Answer. Yes, sir (handing the same to the witness).

"Question. Will you turn to the place where you entered it?

"Answer. I may say that this book is frequently used as a book of original entry to which Mr. Evans refers. (Note the record shows that Mr. Evans was one of the counsel of appellees.)

"The Court: He can refer to it to refresh his memory."

Defendant's counsel thereupon excepted to the ruling of the court.

"Question. From anything you see there can you testify the date of his call?

"Answer. Yes, sir.

"Question. State the date that he called.

"Answer. From a memorandum which I made here which I dated, I find it was on the 31st day of October, 1885.

"Question. State in regard to the price at that time, if you have anything there.

"Answer. I have here a memorandum stating that at the time the price named was \$90,000, which he directed us to sell the property for.

"Question. State when that memorandum was made.

"Answer. The memorandum was made on the 31st day of October, 1885.

"Question. What is the character of that memorandum?

"Answer. It is in private marks, sir.

"Question. In regard to it being original, or secondary or what?

"Answer. It is the original entry."

Nothing follows qualifying what is recited. Now, if the witness had stated that he remembered the interview, but that either the date or the new price had been forgotten, and that he made a note of these particulars at the time, which he then knew to be true, the ruling of the court would have been technically correct. 1 Gr. Ev., Sec. 437; Hayden v. Hoxie, 27 Ill. App. 533.

The witness, however, had not so stated, nor was the book used for the purpose for which the court ruled that it was admissible. He was at once questioned, without objection, not as to what he remembered, with or without the aid of the book, but as to what the book itself showed, which, unless the book was admissible on the rule of *res gestæ*, would have been erroneous, if objected to, but being permitted to pass without exception, all objection is waived.

Subsequently, on the cross-examination of the same witness, the appellant offered the book itself in evidence. It was then incorrectly assumed by both court and counsel that it was already in, and it rather vaguely appears that it was so used by the appellant.

In the further progress of the case, the appellant put in a postal card, addressed to the appellees, and on the other side stating that "some time having elapsed since we were ad-

Monroe v. Snow.

vised as to the price and terms of the property hereinafter mentioned, will you kindly insert below any change you desire to make, and return this to us," signed by the appellees.

This was dated February, 1886, and stated the price of the property at \$100,000. The appellant testified that Snow wrote and gave this card to him at the interview of February 13, 1886. It was very satisfactorily proved that in fact it was written, under general instructions embracing two or three thousand cards, by a clerk of the appellees, after February 22, 1886. On the card were some characters which seemed to be the figures 13112, but which in the handwriting of that clerk were the letter B, and the figures 112, and which were interpreted by testimony, as being a reference to the book in which the \$90,000 in private marks was.

This card was put in by the appellant as corroborating the appellant and contradicting the appellees, that February 13, 1886, the price was, or was not, changed from \$90,000 to \$100,000. It was therefore competent for appellees to show such circumstances, if any there were, as took from the card that appearance of contradiction of their testimony. Merely showing that the account given by the appellant was incorrect, was not enough for that purpose, for the card would still remain as one going out, in the course of business, from them, and therefore evidence against them that the price at which they might sell was \$100,000. To explain away the apparent contradiction, the clerk testified that he took his figures from the figures on the book, and at that time he did not know the meaning of the private marks. The use that the appellant made of this card, rendered it competent for the appellees to show that the clerk made the card, under general instructions applicable to thousands, from such data as he understood, and that the same book then contained private instructions from the appellant, according with their testimony on the trial, and of which no notice was taken by the clerk in writing the card. If, therefore, at the time the book first appeared in the case, an error in regard to it had been committed, and an exception saved, the later phase of the case by which the same evidence became competent in rebut-

tal would have cured the error. But as *res gestæ*, things done, the book was original competent evidence. Whether Snow told the true story about it, was a question of fact for the jury; but in all questions as to the competency of evidence, that it may be true, must, in the nature of things, be assumed.

It may be incompetent on the ground that it is not of the character least likely to be untrue, as by parol of the contents of writing, but when the best that can be, of the matter to be shown, is offered, it is no objection to its competency that the witness may tell an untrue story. Now if, in fact, the appellant did, October 31, 1885, tell Snow to sell the property for \$90,000, and if Snow then had before him a book in which the property had been before entered under former instructions from the appellant, and Snow then in the presence of the appellant put into the book a new date, and a new minimum price, though in cipher, it is a reasonable, if not a necessary, inference, that such entry was made in the natural course of business, as a prudent precaution against forgetfulness of either the price or the date of the instructions, and as to price, in cipher, that persons who had no right to know, might not know, the lowest price for which the owner would sell. It is in principle the same as *Stark v. Corey*, 45 Ill. 431, "a fact which transpired at the time, giving character to the transaction," by the showing which the book made, if true, to one who understood it, that October 31, 1885, the appellant authorized the appellees to sell his property at the minimum price of \$90,000, as in the case cited, the check stub, if true, showed that the check was issued on account of the firm named on it. There is no error in the record.

Judgment affirmed.

MORAN, J. I do not concur in so much of the opinion of Mr. Justice Gary as regards *res gestæ*.

EDWARD A. STEVENS ET AL.

V.

ST. MARY'S TRAINING SCHOOL ET AL.

Municipal Corporations—Misapplication of Public Funds—Sectarian Object—Injunction—Sec. 8, Art. 8, Constitution—Practice—Appeals—Sec. 88, Chap. 110, R. S.

1. This court dismisses for want of jurisdiction an appeal from an order dissolving an injunction, it being sought to restrain the payment of public funds to defendant on the ground of its being a sectarian institution under church control.

2. Appeals in such cases are granted only to the Supreme Court.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. O. H. HORTON, Judge, presiding.

Mr. FRANCIS C. RUSSELL, for appellants.

Messrs. SMITH & PENCE, for appellee.

GARNETT, P. J. The decree in this case, as well as the assignment of errors and the argument of appellants, involve the construction of Sec. 8, Art. 8, of the Constitution of the State. Appeals in that class of cases are granted to the Supreme Court only, by Sec. 88, Chap. 110, Rev. Stat. County of Cook v. Industrial School for Girls, 125 Ill. 540.

The appeal is dismissed for want of jurisdiction.

Appeal dismissed.

EDWARD C. HULING

v.

SIMEON FARWELL ET AL.

Partnership—Dissolution—Accounting—Reference to Master—Report of—Exceptions to—New Exceptions—Amendments.

In proceedings touching the dissolution of a co-partnership, this court holds that the exceptions of the parties to the suit to the master's report were bad for uncertainty, and declines to interfere with his finding that a sum named was due the complainant.

[Opinion filed May 29, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

Messrs. HOYNE, FOLLANSBEE & O'CONNOR, for appellant.

Messrs. FLOWER, REMY & HOLSTEIN, for appellee.

GARY, J. October 18, 1884, the appellant, with the appellees, Henry S. Farwell and Stephen Lasky, entered into partnership as merchants in Chicago, under the firm name of Farwell, Huling & Co. In the following summer dissensions arose in the firm, and after proceedings not necessary to state here, on a bill for an accounting filed by the appellant, there was a reference to a master, who reported October 28, 1888. In that report the master found that the firm had made a total loss of \$8,234.79, and that the value of the interest of the appellant in what, for want of a better name, the master called the good will of the business, was \$5,000.

For the purposes of this opinion it is not necessary to present the other items of the account as he stated it. His result was, that there was due from the appellees to the appellant \$1,596.70. Before the master, the appellant filed these objections:

33	238
41	34
41	399
33	238
43	612
33	238
50	151
51	300
33	238
55	243
55	408
33	238
58	382
33	238
59	377
59	419
33	238
60	402
60	470
132s	112
33	238
33	315
66	600
33	238
79	238

Huling v. Farwell.

"First. The said master found that the value of Mr. Huling's interest in the good will of the firm was \$5,000 on July 29, 1885, whereas he should have found his interest therein at the time was \$25,000.

Second. That said master took into consideration in making up his report, testimony of witnesses taken before the court on behalf of said defendants, as to the value of the good will of the business at the date of the dissolution, and prior thereto, based upon certain figures which were afterward found by the court expert to be incorrect.

Third. That the master permitted in evidence fragmentary statements gathered from the books of the firm by the defendants themselves.

Fourth. That said report is against the weight of evidence.

Fifth. That the master considered statements taken from the books of the firm by said defendants which were unreliable, uncertain, inaccurate and utterly untrustworthy.

Sixth. That said master erred in the admission of testimony on behalf of said defendants."

And among others the appellees filed this:

"First. That the master found that the complainant was entitled to be credited on his account with the sum of \$5,000 as the value of his good will in the firm, when, in fact, said good will had no value."

Before the court afterward each party filed exceptions to the master's report, in the same form as their respective objections before the master, and after the final decree, by consent of the counsel for the appellees, the counsel for the appellant filed *nunc pro tunc*, as of the date of hearing the exceptions, this: "Complainant further excepts to the master's report on the ground that whereas, the master has found that there was a loss in the business of said firm on the 29th of July, 1885, he should have found that there was a gain and profit in said business on that date, and he excepts to the finding of the master that there was a loss of \$8,234, and insists that he should have found that there was a gain of \$1,285.13 on that date.

The court overruled all of the exceptions but that one of the appellees before copied, the result of which was, according to the arithmetic there, to bring the appellant in debt to the appellee Henry S. Farwell, \$3,403.29, for which a decree in his favor against the appellant was entered.

It is a rule of chancery practice as vigorously enforced in this State as anywhere, that in matters of account, if at all complicated, "the cause must be referred to a master to render a concise and accurate statement of the accounts, so that the same may be readily comprehended, and any objection taken, passed upon understandingly," quoted in *French v. Gibbs*, 105 Ill. 523, from *Moss v. McCall*, 75 Ill. 190, and many cases cited. "It is a labor that counsel will not be permitted by stipulation or otherwise to impose on an Appellate Court. *French v. Gibbs*, *supra*. And if the Circuit Court assumes to perform it, the decree will be reversed because "it is impossible for the court, in any reasonable time, to pass understandingly on the objections to the findings of fact by the court in its decree." *Ibid*. The same rule was followed in the still more recent case, *Beale v. Beale*, 116 Ill. 292.

The rule that the matter which is the ground of the exception to the report must first be made the ground of objection before the master that he may reconsider his rulings, as announced in *Pennell v. Larnar Ins. Co.*, 73 Ill. 303, and *Prince v. Cutler*, 69 Ill. 267, and cases there cited, was followed in this case, except as to the last exception of the appellant; but another rule, without the observance of which the whole practice of requiring reports of masters in cases of accounts is wholly useless, has been utterly disregarded by both parties in forming their objections and exceptions.

In *Story v. Livingston*, 13 Peters, 359, some of the exceptions were :

"Second. The master has erred in not allowing to the defendant the \$1,000 with interest, paid to Morse, or some part thereof.

Fourth. The master in making his estimates and calculations has not pursued the mandate of the court.

Fifth. It appears from the master's report, that the stores

were rented from November to November; and he erred in assuming the first of April as the period of payment of annual rent.

Sixth. A reasonable allowance should have been made to Story for the cost and risk of collecting rents.

Seventh. The master erred in all his charges against the defendant; and he failed to allow the defendant his proper credits.

The court say: "All these exceptions are irregularly taken, and might be disposed of by us without any examination of them in connection with the master's report. They are too general, indicate nothing but dissatisfaction with the entire report and furnish no specific grounds, as they should have done, wherein the defendant has suffered any wrong, or as to which of his rights have been disregarded." * * * "Exceptions to a master's report must state, article by article, those parts of the report which are intended to be excepted to."

So in *Emerson v. Atwater*, 12 Mich. 314, where the exception was "for that the commissioner has credited to complainant the sum of \$9,210,371, for amount Atwater has received on sales of lots and interest thereon, to May 5, 1860, whereas he should have credited a less sum," the court say: "But this exception is too indefinite and uncertain to admit the raising of such an objection under it. It points to nothing. It is aimless. It finds fault with the report, without giving any reason for it except the common one always given by the vanquished party, viz., the decision is wrong and that great injustice has been done to him." See also case of "*Commander in Chief*," 1 Wall. (S. C.) 43.

Foster v. Goddard, 1 Black, 506, may be read as trenching upon this rule, but it does not appear in that case that the court was called upon to do more than review the principles of law upon which the master had acted, or the construction he had given to writings between the parties, and the court was not required there, as in this case, to embark on a voyage of discovery through 800 or more typewritten pages, without chart or compass, to ascertain whether the master had

made right conclusions of fact from the evidence. *Stanton v. A. & C. R. R. Co.*, 2 Woods, 506.

The reasons for requiring a report assigned in *Moss v. McCall*, 75 Ill. 190, are no reasons at all, if by general exceptions the court may be required to search the whole evidence and determine whether, upon all of it, the master has reached right conclusions of fact. All of the exceptions on both sides should have been overruled, as they only showed the dissatisfaction of the parties with particular findings of the master but gave to the court no clue to the data upon which the master acted.

The decree will be reversed, and the cause remanded with directions to the Circuit Court to overrule the exception sustained as well as the others, and enter a decree for the appellant against the appellees for \$1,596.70 with costs of the cause. No new exceptions or amendments of the present ones would be admissible, as only objections before the master can be exceptions before the court.

Reversed and remanded with directions.

JOSEPH FISH ET AL.

V.

JOHN V. FARWELL ET AL.

38 242
102 663

Practice—Costs—Retaxation of—Witness Fees—Non-suit—Sub. 5, Sec. 16, Chap. 25, R. S.—Attendance—Mileage —Travel outside the State.

1. Mileage for travel outside the State can not be taxed as costs in civil causes.

2. The fact that a certain witness was not examined at a given term does not warrant the withholding of his fees.

3. A witness may file his affidavit at each term of court, or wait till the term at which the judgment is rendered and then do so, showing therein the number of days he attended at each term, in which case the clerk is authorized to make up and enter the costs in the fee book.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. MOSES & NEWMAN, for appellants.

Messrs. TENNEY, DRIGGS & HAWLEY, for appellees.

MORAN, J. This is an appeal from the order of the Superior Court, refusing to retax costs in said case. By stipulation between the attorneys the cause was set for trial before Judge Gary on the 25th day of June, 1888.

The defendants prepared for trial on that day, and had their witnesses in attendance, but the court was engaged in the trial of another case, and defendants had to keep their witnesses in court, awaiting the calling of the case, until July 2d, when, by agreement, the case was continued over the summer vacation, and set for trial in September before the same judge. After the trial when entered upon in September had progressed for two days, plaintiffs took a non-suit, and judgment was rendered against them for costs, and the clerk taxed against them the attendance of defendants' witnesses in June, though the said witnesses did not claim their attendance till the judgment was rendered at the September term. It is contended that this is in violation of Sub. 5, Sec. 16, Chap. 25, R. S., which provides that the clerk shall keep "a fee book, in which shall be distinctly set down any item under the proper title of the cause and heads, the costs of each suit, including clerk's, sheriff's and witness' fees, stating the name of each witness having claimed his attendance during the term, with the number of days he attended at each term."

The point is not well taken. We think the proper construction of the entire clause is that a witness may file his affidavit claiming his fee at each term, or may at the term at which judgment is rendered, file his affidavit showing the number of days he attended at each term, and that the clerk is then authorized to make up and enter the costs in the fee book. And such, as we understand, has been the practice.

The fact that the witnesses were not examined at the June term constituted no ground for denying them attendance. It was the duty of defendants to have their witnesses in court when they were in constant expectation of entering upon the trial, and the costs incurred in so doing are properly taxable against the plaintiffs.

The clerk in taxing costs allowed to one witness mileage for 700 miles, and to another mileage for 1,240 miles. We have no statute which authorizes the allowance or payment of mileage for travel outside the State to witnesses in civil cases. Costs were not given at common law, and are not taxable or recoverable when not awarded by statute.

Appellant's counsel have cited us to a number of cases in which the question of the allowance as costs of the mileage of witnesses for travel outside the State has been considered, and in all of them it is decided that such mileage can not be taxed as costs. *Melven v. Whiting*, 13 Pick. 184; *White v. Judd*, 1 Met. 293; *Howell v. Blackwell*, 7 Ga. 443; *Kingfield v. Pullen*, 54 Me. 398; *Howland v. Lenox*, 4 Johns. 311; *Gunnison v. Gunnison*, 41 N. H. 121; *Crawford v. Abrahams*, 2 Ore. 165.

Those decisions we deem sound. The law provides for taking the depositions of witnesses by commission, and the bringing the witnesses from great distances and from beyond the limits of the State, ought not to be encouraged. We think the court erred in refusing to strike out the allowance for mileage for said witnesses outside the State, and in not directing a re-taxation of the costs so as to relieve appellant from said charge for mileage.

The order appealed from must be reversed and the matter remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Judge GARY takes no part in this case, having tried it in the Superior Court.

WILLIAM C. GOUDY
v.
THE CITY OF LAKE VIEW.

*Municipal Corporations—Streets—Private Property—Condemnation of—
Damages—Limitations—Evidence—Instructions.*

This court declines to interfere with a verdict omitting to make any allowance for the alleged injury to land remaining after a certain portion needed was taken under condemnation proceedings for street purposes by a municipality.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. JOSEPH E. GARY, Judge, presiding.

Mr. A. W. GREEN, for appellant.

Mr. H. H. ANDERSON, for appellee.

MORAN, J. The city of Lake View condemned part of the lot of appellant for a public highway. The highway was laid out on the west line of Lincoln Park, and took fifty feet off the east line of the lot in question, so that after the opening of the street the lot abutted thereon instead of upon the park. Appellant had by consent of the Lincoln Park commissioners a private entrance from the said lot to the park which he had maintained and used for some seventeen years. No complaint is made as to the value allowed by the jury for the part of the lot actually taken, but it is contended that the verdict is against the evidence on the question of damage to the remainder of the lot by reason of the improvement, for which no allowance was made.

The evidence on the question consisted of the conflicting opinions of real estate experts and property owners living in the neighborhood, each witness sustaining his opinion with

reasons more or less plausible. The conclusion that the remainder of the lot suffered no damage by reason of the improvement, is clearly supported by the evidence. It is true that the verdict would have been supported by the evidence if the contrary conclusion had been reached, but the question as to which set of opinions were best supported by reasons and entitled to the most weight was manifestly for the determination of the jury, and under the circumstances the court is without authority to interfere with the result which the jury reached from consideration of the evidence. It is contended that the court erred in instructing the jury that the permission given by the park commissioners to appellant to enter the park from his lot by the private entrance was revocable and might be withdrawn at any time, and that the statute of limitations did not run against said commissioners and in favor of appellant in respect to said private entrance. No authority is cited in support of appellant's contention in this regard, and we are aware of no principle of law which sustains it. In our opinion the law was correctly stated by the court in the instructions complained of.

There is no error and the judgment will be affirmed.

Judgment affirmed.

GARY, J., having tried this case in the Superior Court, takes no part in this decision.

MARCUS C. STEARNS

v.

PATRICK REIDY.

Master and Servant—Vice Principal—Negligence of—Personal Injuries—"Missed Hole" in Quarry—Explosion—Pleadings—Proof—Variance—Amendment—Limitations—Damages—Evidence—Instructions.

1. A servant, who, in ignorance of the danger, obeys an order given by a superior servant who is aware that almost certain death will result from compliance therewith, is entitled to damages for injuries suffered thereby.

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Stearns v. Reidy.

2. In an action by a servant for the recovery of damages for injuries suffered through obeying the orders of a superior servant, this court holds that the defendant can not rely upon a variance between the pleadings and the proof, which but for his opposition would have been removed.

3. In the case presented, this court sustains a judgment in behalf of the plaintiff for \$9,000 for injuries received by him in an explosion in a stone quarry, the same resulting in total blindness.

[Opinion filed May 29, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. GREGORY, BOOTH & HARLAN and A. B. JENKE, for appellant.

Mr. L. K. DOBB, for appellee.

GARY, J. Six juries have been impaneled in this case; four have found verdicts, one for the appellant, before me, which I set aside, not upon any ground touching the merits of the case, but upon an erroneous instruction, and three since for the appellee.

There is but one point upon the facts, in dispute between the parties. The appellee was injured and made blind by the explosion of a charge of dynamite in a "missed hole" in the quarry of the appellant, at which hole the appellee, being in the service of the appellant, was at work under the order of the foreman of the quarry. The only dispute is as to what was the order given by the foreman. He knew that the place was a "missed hole," that is, a hole charged with dynamite which had failed to explode, and the evidence on the part of the appellant is, that the order to the appellee was to clean out a missed hole with a scraper. On the part of the appellee it is, that the order was to drill a hole in a stone. The brief of the counsel of the appellant, after reciting special questions put to the jury, and their answers thereto, says: "It thus fairly appears by the special findings, that the jury reached the conclusion that this accident happened

through a direction given to the plaintiff to drill a hole in a rock." This concession makes it unnecessary to demonstrate the same conclusion.

The jury, then, having found the one point in dispute on the facts in favor of the appellee, and the liability of the appellant following from the fact found and the other facts undisputed, there is no need to examine the instructions, for there is no ground in the record on which to claim, and it is not claimed that any instruction tended to influence the jury in that special finding.

By instruction on the part of appellant, but not by evidence, some question was made whether the appellee knew, or by the exercise of ordinary care could have known, that he was drilling a hole, and to questions upon that matter, the jury have answered, no. If, in fact, the foreman gave an order to the appellee which the foreman knew it was almost certain death to obey, and the appellee without knowledge of the danger, was injured in obeying it, his right to recover is clear. *C. & A. R. R. Co. v. May*, 108 Ill. 288. And what are the facts, the verdict of the jury, upon conflicting evidence, settles.

But there is a great stumbling block in the case. There are four counts in the declaration, and each one alleges that the order of the foreman to the appellee was to clean out "a certain hole, which had before that time been drilled," and the instructions for the appellee base his claim to a verdict upon the same hypothesis, while the testimony of the appellee himself, as well as the finding of the jury, is that the order was not to "clean out," but to "drill" a hole, so that there is a clear variance, one form of the order being to make a hole, the other to clean out one already made. The accident occurred in October, 1881. The last trial was in October, 1888. In October, 1887, the appellee, by leave of the court, added to his declaration a count alleging the order of the foreman to him to have been "to drill a hole." To that count a plea of the statute of limitations was held to be a bar. After the present verdict was rendered, and before judgment, he asked leave to amend the first count of the present

Stearns v. Reidy.

declaration to the same effect. This leave was denied. Whether, being the exercise of discretion, the refusal of leave to amend the first count be error or not, the granting it would not have been. *Ind. Order Mut. Aid v. Paine*, 122 Ill. 625; *Tomlinson v. Farnshaw*, 112 Ill. 311; *McCollon v. Ind. & St. L. R. R. Co.*, 94 Ill. 534; *Cogshall v. Beesley*, 76 Ill. 445.

But the overruling of the demurrer to the plea of the statute of limitations, was error. The cause of action which the appellee claimed, was injury by negligence of the appellant, by the application of the rule *respondet superior*.

One recovery against the appellant for that injury, whatever might be the allegations of the declaration, would bar all further litigation, though perhaps a judgment for the appellant might not be a bar to a new action, upon a declaration stating the circumstances leading to the injury in a different manner. This does not settle the question.

A judgment for a defendant may be because of a variance, and therefore no bar, while a judgment for a plaintiff extinguishes the cause of action, even if wrongfully described. All the damages which can by any possibility result from a single tort, form an indivisible cause of action. *Freeman on Judg.* 241. The new count "was merely another mode of telling the same story." *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416; *North C. R. M. v. Monka*, 107 Ill. 340; see also *Mitchell v. Mulholland*, 106 Ill. 175; *Dickson v. C., B. & Q.*, 81 Ill. 215; *I. C. R. R. v. Cobb*, 64 Ill. 128.

Now if the error on that count had not been committed, or if the leave to amend the first count had been granted, which, consistently with denying the motion for a new trial, would seem to have been regular, the variance now existing and which is a ground of objection by the appellant, would have been removed.

Shall the appellant have any advantage of a variance which but for his opposition would have been removed?

There is absolute good sense in the concluding sentence of the opinion in *Pearson v. Zehr*, 125 Ill. 573. "Undoubtedly an appellate court, where proper exceptions have been taken, and errors are properly assigned, may disregard

certain errors, upon the ground that they would have been immaterial had the court properly ruled on other questions;" though in the connection in which it is found, it is not applicable as authority in this case. See also *Bensley v. Brockway*, 27 Ill. App. 410, where that rule would have been acted upon if it had been found to fit the case.

In *The People v. Utica Ins. Co.*, 15 Johnson (N. Y.), 358, the chief justice thought it ungracious, though not an estoppel, to set up the objection that *quo warranto* would not lie, when the defendant had gone away from the court of chancery on the ground that it would; but in *Powell v. Ross*, 4 Cal. 197, the Supreme Court of California enforced the sensible rule that the defendant could not urge in the Supreme Court the non-joinder as a co-plaintiff of one whom he had driven out of the court below. All the evidence accessible to either party as to the whole transaction has been put in; on the disputed point the jury have found specifically for the appellee. If that finding is right, his right to recover is clear, and justice has been done.

The damages, \$9,000, are large. If measured only by pecuniary loss, excessive. But the appellee goes sightless to his grave, and after a very protracted litigation, gets a poor equivalent for the constant deprivation he endures. Without sharing in the indignation of Judge Breese in *Ross v. Innis*, 35 Ill. 487, something of his argument applies here. The other questions in the case are of minor importance. The judgment will be affirmed.

Judgment affirmed.

EDWARD KRAMER

v.

JOSEPH IMHOFF.

Chattel Mortgages—Foreclosure—Injunctions—Removal of Property by Mortgages—Evidence.

This court declines to interfere with a decree of foreclosure of a chattel

Kramer v. Imhoff.

mortgage, and holds that the property alleged to have been taken away by the mortgagee was not identified with the property named therein; that at the time of such taking, the mortgagor acknowledged that the same was not covered by the mortgage, and that by arrangement with the mortgagee and on his credit other property of like description was procured by the mortgagor to take its place.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. CHARLES A. FANNING, for appellant.

Mr. JAMES LANE ALLEN, for appellee.

GARY, J. The appellant filed his bill to enjoin the foreclosure of a chattel mortgage, upon the alleged ground that the mortgagee had caused a large part of the mortgaged property to be taken away from the mortgagor, and refused to account for the value thereof.

The appellee answered denying, and filed his cross-bill for a foreclosure. The decree was in favor of the appellee for all he asked. There is no principle of law or equity involved in the case; nothing but questions of fact; and a recital of the evidence, with comments upon it, would be of no use to anybody. It is enough to say, that of the property said to have been taken away, there is no identification of any specific articles with the property described in the mortgage, and that at the time it was taken, the appellant seems to have acquiesced in the claim that it was not part of the mortgaged property, and by arrangements with the appellee, the appellant supplied its place, it being furniture of some rooms—by procuring other furniture upon the credit of the appellee. The decree must be affirmed.

Decree affirmed.

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THE BOGUE-BADENOCH COMPANY

v.

NOEL B. BOYDEN, FOR USE, ETC.

Replevin Bond—Suit upon—Errors of Trial Court—Failure to Assign—Rule 15.

This court will not consider an appeal where no errors are assigned upon the record or attached thereto as required by rule 15.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

MESSRS. THORNTON & CHANCELLOR, for appellant.

MR. G. W. PLUMMER, for appellee.

GARY, J. This is a suit upon a replevin bond by the late coroner of Cook county, for the use of the judgment creditors upon whose execution the property was in the hands of the sheriff, at the time it was replevied by the appellants. The merits were not tried in the replevin suit, and were, therefore, open to inquiry in this. The record has been examined by the court and there is no error in it.

It is unnecessary to go through the various objections made by appellants' brief. No errors are assigned upon the record or attached thereto in accordance with rule 15. A loose paper, unsigned, unentitled either as to case or court, with no file mark upon it, is found among the printed matter which came to the hands of one of the judges when the case was being examined in conference, which says some judgment is wrong, but it is mere conjecture that it has anything to do with this case. The judgment is affirmed.

Judgment affirmed.

SAMUEL S. CHISHOLM
v.
THE BEAVER LAKE LUMBER COMPANY.

Evidence—Competency—Deposition—Telegrams—Copies.

This court holds as incompetent and immaterial, portions of a certain deposition introduced in evidence after the case presented was remanded to the trial court, and that the additional evidence, introduced at the second trial, did not materially change the facts as presented by the former record.

[Opinion filed June 14, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. JESSE COX, for appellant.

Messrs. FRANK J. SMITH & HELMER, for appellee.

MORAN, J. This case was before this court at the October term, 1885, and was then reversed because the trial court admitted in evidence certain copies of telegrams, which were attached to the deposition of one Olson, read on the trial, there being no proof in the case which made the copies competent evidence, and it was said by this court "that without the telegraphic messages attached to the deposition the plaintiff's evidence would have been insufficient to support the verdict."

After the case was remanded to the Superior Court, appellees struck out of the deposition all references to the telegrams which were held incompetent, and thereupon appellant moved to suppress the remainder of the deposition, as it appeared from it that statements which it contained were not made upon the knowledge of the witness, and because he clearly evaded (in answering cross-interrogatories), stating the means of his knowledge. The court overruled the motion and allowed certain portions of the deposition to be read, to the reading of which proper exceptions were saved.

There is in the deposition no statement which, standing by itself, or taken in connection with anything else in the record, is competent and material; the additional evidence introduced at the last trial does not materially change the facts as presented by the former record.

The theory of appellee seems to be that it should have judgment unless appellant proves that he does not owe the debt. There is no competent evidence to sustain the verdict and the judgment must be reversed and the cause remanded.

Reversed and remanded.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

V.

EDWARD R. BLAGDEN, FOR USE, ETC.

Garnishment—Answer of Garnishee—Objections—Collusion—Payment in Advance—Evidence.

1. The answer of a garnishee until contradicted or disproved must be considered as true. If judgment is demanded upon the answer it must appear therefrom that the garnishee is chargeable, or he will be discharged.

2. An employer may, after the service of the writ, properly pay the wages of a servant in advance, in order to prevent the same from being reached under garnishment proceedings.

[Opinion filed June 14, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. W. H. LYFORD, for appellant.

Messrs. E. B. KING and F. W. BECKER, for appellee.

MORAN, J. This was a proceeding by garnishment against appellant to reach wages coming to said Edward R. Blagden. The attachment was commenced before a justice of the peace, and the writ was served on appellant as garnishee on the 18th day of June, 1886.

Appellant's answer was filed on June 26th, in which it was stated that it had in its possession and control at the date of the service of the writ, the sum of \$6 and no more, of wages due or belonging to said Blagden. The case was continued from time to time until September 2d, when objections to the garnishee's answer were filed, and such proceedings were afterward had, that a judgment was entered by the justice against the garnishee for \$103, and costs, being the amount of the judgment recovered against the defendant, Blagden, in the attachment suit. From this judgment the garnishee appealed to the Superior Court of Cook County, and in said court plaintiffs filed by leave of the court further interrogatories to the garnishee on October 19, 1888, which were answered by the garnishee, again stating that it had not in its possession, at the service of the writ or at any time, up to the filing of the answer, any sum of money, chose in action, etc., etc., due, or that might in the future become due to said Blagden, saving and excepting said sum of \$6.

The sixth interrogatory was as follows: "Was said Blagden in your employment at the date of the services of said writ, or since, and if so, what salary did he receive, and how long was he in your employ after said service?" This was the answer:

"To the sixth interrogatory, the said railroad company, garnishee, answering, says that said Edward R. Blagden was in its employ from the date of the service of the writ in this cause continuously until the 13th day of February, A. D. 1888; that during all said time his salary was at the rate of \$60 per month; that said salary was for each month due and payable after the first day of the following month; that on the date of the service of the writ in this cause, to wit, the 18th day of June, A. D. 1886, this garnishee advanced to said Blagden the sum of \$24; that on the first day of July, 1886, said garnishee advanced to said Edward R. Blagden the sum of \$30; that thereafter on or before the fifteenth, and likewise on or before the first day of each and every month up to and including the first day of February, 1888, said garnishee advanced to said Edward R. Blagden a like sum of \$30, whereby

there was not any time between said 18th day of June, 1886, and the date hereof, to wit, the 19th day of October, 1888, any sum of money due or owing from said garnishee to said Edward R. Blagden. On the contrary, this garnishee avers that there is now due and owing from said Edward R. Blagden to said garnishee the sum of \$4 advanced by said garnishee to said Blagden on the first day of February, 1888, which this garnishee claims as set-off to be deducted from said sum of money, to wit, \$6, leaving \$2 subject to the order of this court in this case."

There were some additional interrogatories and further answers, but the question on which the case must be decided fully appears from what has been set forth.

No evidence was introduced at the trial, but the court gave judgment against appellant for \$103 and costs, upon the answer. "The answer of the garnishee, until it is contradicted or disproved, must be considered as true. If judgment is demanded upon the answer, it must clearly appear therefrom that the garnishee is chargeable, or he will be discharged." *The People v. Johnson*, 14 Ill. 342; *C. & St. L. R. R. Co. v. Kellenberg*, 82 Ill. 295.

It is plain that the foregoing settled rule was disregarded by the court below, in rendering judgment against the garnishee in the case. The answer clearly states that at the service of the writ there were \$6 due from the company to Blagden and no more, and the facts set forth show that there was never a time from the service of the writ to the filing of the last answer when it was indebted in any further sum to said Blagden.

No evidence was introduced to controvert these statements of the answer, and it is not perceived how, taking them as true, they warrant a judgment against the garnishee for more than \$6. It is suggested in support of the judgment, that the answer shows that the salary "for each month was due and payable after the first day of the following month," and therefore the loan or advance made by the company was the inauguration of a new system of payment to defeat the garnishment.

The answer does not state that Blagden was employed to serve for any definite period, but merely that he had continued in the employ of the company at a salary of \$60 per month. While, under such an arrangement, the company could not be compelled to pay till the end of the month, we are aware of no principle of law which would prohibit its doing so. What rule is there that would make it improper for the company to loan or advance money to Blagden, on an understanding or agreement that he would pay in services thereafter to be rendered.

Collusion by the company with Blagden to prevent the plaintiff from obtaining anything that the services of the writ upon the garnishee entitled him to, is, to say the least, not necessarily to be inferred from the facts set up in the answer. Such inference is, as it seems to us, in fact negatived. Blagden was not obliged, so far as appears, to continue in the employ of the company after the service of the writ, and if he did, then there was nothing to prevent the company from paying him in advance, even though the very purpose of such advance payment was to prevent the wages from being reached under the garnishment.

In *Alexander v. Pollock*, 72 Ala. 137, it appeared from the answer that the party whose wages it was attempted to reach had been in the service of the garnishee for some time prior to the services of the writ; that immediately after such service an arrangement was entered into that the wages should be paid each week in advance; that the employment continued, under said arrangement from the service of the writ to the making of the answer, upward of a year, and that the contract to pay in advance was made with the intention of defeating the garnishment.

The court held the contract to pay the wages in advance to be free from legal objections, rightfully made, and that "its terms and conditions can not be interfered with, interrupted or changed in any manner, through operation of garnishment proceedings." See also *Phelps et al. v. The A. T. & S. F. R. R. Co.*, 28 Kansas, 165.

No fraud being shown, appellee could recover nothing from

the garnishee that Blagden himself could not recover in an action at law in his own name. It is clear that he could recover no judgment against the company for services rendered after the service of the writ under the facts set up in the answer, there being nothing due him for such services.

The Superior Court erred in giving judgment against the garnishee for more than \$6, and the judgment must therefore be reversed and the cause remanded for such further proceedings as the parties may desire to take.

Reversed and remanded.

GEORGE P. BARTON

V.

WILLIAM TREUTLER.

Master and Servant—Building Contractor—Architect's Certificate—Waiver of—Balance due—Extras—Evidence—Special Findings.

In an action for the recovery of a balance claimed to be due under a building contract and for certain extras, this court, in view of the evidence, declines to interfere with a verdict for the plaintiff.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. FRANK H. McCULLOCH and CHARLES H. ALDRICH, for appellant.

Mr. C. M. HARDY, for appellee.

Per Curiam. This was an action to recover against appellant for a balance alleged to be due on a contract for carpenter work, and for certain extras. There were several points of contention between the parties, and the record is quite voluminous.

Hinckley v. Horazdovsky.

We have carefully examined and considered all the points made, and we are of opinion that no material error is shown to have been committed on the trial. It would serve no useful purpose to follow counsel for appellant in an opinion, and discuss and decide in detail, each of his contentions. As to the disputed questions of fact, the verdict of the jury is conclusive.

The answers given by the jury to the special interrogatories submitted to them by the court at the request of appellant, are all consistent with the general verdict, and serve to show that each issue of fact made by appellant was considered.

The answer to the 15th question, finding that appellant waived the production of a certificate from the architects, being supported by evidence in the record, takes out of the case appellant's principal contention, to wit, that the production of such certificate was a condition precedent to maintaining this action.

We find no error and the judgment must therefore be affirmed.

Judgment affirmed.

GEORGE W. HINCKLEY

v.

JOSEPH HORAZDOVSKY.

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Master and Servant—Vice Principal—Negligence of—Personal Injuries—Recovery for—Damages—Evidence—Instructions.

1. In an action by a servant for the recovery of damages for personal injuries alleged to have been occasioned through obeying the orders of a superior servant, this court holds that the general instruction, given in lieu of those requested, properly and fully stated the law governing the case, and that the evidence, though conflicting, sustains the verdict for the plaintiff.

2. Where the evidence is conflicting, this court has no authority to set aside a verdict unless the same is shown to be manifestly against the evidence or to have resulted from passion or prejudice.

[Opinion filed June 14, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. M. L. RAFTREE, for appellant.

Messrs. JONES & LUSK, for appellee.

Per Curiam. This action was brought to recover for injuries received by appellee, a boy of twelve years of age, while in the employ of appellant.

It is alleged that appellee was directed by the foreman of appellant to oil, while it was in motion, a planing machine, about which he was at work, and that in doing as he was directed, he was caught in the machine and severely injured. Appellant claims that the court erred in the matter of giving and refusing instructions. The court refused all the instructions asked, and gave a general instruction prepared by the judge himself in lieu of those requested. We have examined said instruction and considered the criticisms of appellant's counsel thereon, and we are of opinion that the same fully and fairly stated the law to the jury on all the questions in the case, and that there is no error in that regard. It is strenuously contended that the verdict is against the evidence. There is a direct conflict in the evidence upon several of the issues of fact which arose upon the trial, but a careful examination of the evidence in the record leads us to the conclusion that on every material issue the evidence fairly supports appellee, and that the verdict as a whole can not be said to be manifestly against the weight of the evidence.

Where the evidence is conflicting, the verdict of a jury is conclusive, and this court has no authority to set aside the verdict unless it is shown to be manifestly against the evidence or to have resulted from passion on the part of the jury.

We find no error in the record and the judgment will therefore be affirmed.

Judgment affirmed.

Hahn v. Maxwell.

FRANK HAHN
v.
JAMES MAXWELL ET AL.

Sales—Promise to Pay by Third Person—Agreement for Delay—Consideration—Lien—Evidence.

In a suit brought to recover from third persons the contract price of a lot of stone sold to another, this court declines, in view of the evidence, to interfere with a judgment in behalf of the defendants.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. GOLDZIER & ROGERS, for appellant.

Mr. S. M. MEEK, for appellee.

GARY, J. The appellant furnished stone to one Hayes to be used by him in erecting buildings for the appellees.

There was testimony that the appellant, some two weeks after the delivery of the last stone, presented his bill to the appellees, they having taken the contract for erecting the buildings away from Hayes, and they promised the appellant that if he would wait a month, they would pay it.

He waited the month, during which time the forty days in which the appellant might, under Sec. 31, Chap. 82, R. S., have served a notice to secure a lien on the buildings, expired, and then the appellees refused to pay. On demurrer to the evidence, the Circuit Court rightly held that the appellant had no cause of action against the appellees. The debt was the debt of Hayes. The evidence does not show that there was any release or promise of forbearance to him. Giving time to the appellees in which to pay what they were not liable for, was of no moment. If there had been a promise in

writing, in the terms of this parol promise, it would have been of no legal effect for want of a consideration to support it. And if the appellant, relying upon the promise, refrained from serving the notice alluded to, it was his voluntary act, not in performance of any agreement that he should so refrain. And the promise, not being in writing, was void under the statute of frauds, if there had been a consideration. Eddy v. Roberts, 17 Ill. 505, contains a sufficient exposition of the law applicable.

There are no circumstances in this case to bring it within the principle of Borchsenius v. Canutson, 100 Ill. 82, and Power v. Rankin, 114 Ill. 52. The judgment must be affirmed.

Judgment affirmed.

JACOB ROSENBERG ET AL.

V.

SIDNEY H. HART.

Malicious Prosecution—Probable Cause—Instructions—Compromise—Bill of Exceptions—Restoration of Part of.

1. No recovery can be had in an action for malicious prosecution against several defendants, where one of them only is found guilty.
2. Nor where the prosecution did not terminate in an acquittal.
3. Nor where the same comes to an end through a compromise between the parties.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MESSRS. LAWRENCE C. COOPER, and DUNCAN & GILBERT, for appellants.

“Where a person has an unblemished character and the prosecuting witness is aware of the fact, it necessarily requires more evidence to create a reasonable belief of guilt, than where the accused has a bad character; and where the prosecution is based on belief, this character of evidence is proper.” Skidmore v. Bricker, 77 Ill. 166.

To maintain his action appellee was bound to prove affirmatively:

1. Want of probable cause.
2. Malice.
3. Voluntary dismissal or abandonment of the prosecution by the appellants or that the merits had been determined in appellee's favor. *Emery v. Ginnan*, 24 Ill. App. 65.

"When the proceeding is dismissed or abandoned by the procurement of the party prosecuted, by settlement or compromise with the prosecutor, it is not, it seems, such a termination of the proceeding as that a suit for malicious prosecution can be maintained."

"The termination must be such as does not admit a reasonable cause for prosecution." "When the termination of the case is brought about by a compromise or settling between the parties understandingly entered into, it is such an admission that there was probable cause that the plaintiff can not afterward retract it, and try the question, which by settling he waived." *Emery v. Ginnan*, 24 Ill. App. 65.

Mr. SAMUEL BAXTER FOSTER, for appellee.

Probable cause, is such a state of facts and circumstances as would lead a man of ordinary caution and prudence, acting conscientiously, impartially, reasonably and without prejudice upon the facts within his knowledge, to believe the person accused is guilty. *Ames v. Snyder*, 69 Ill. 376; *Shaul v. Brown*, 28 Iowa, 37; 4 *Wait's Actions and Defenses*, 343.

A voluntary discontinuance is *prima facie* evidence of a want of probable cause. *Nicholson v. Coyhill*, 4 Bar. and C. 21; *Burhans v. Sandford*, 19 Wend. 417, 109 Mass. 158.

While malice is not a *legal* presumption from want of probable cause, the jury may from it infer malice, not as a matter of law, but as a conclusion of fact. *Roy v. Goings*, 112 Ill. 663, and cases therein cited.

Evidence that the criminal prosecution was an attempt to force a settlement of a private claim, is evidence of a want of probable cause, and of malicious intent. *Slomer v. People*, 25 Ill. 58; 12 *Kans.* 109-112.

And malice is made out by showing that the proceeding was instituted to compel the surrender of property. *Cooley on Torts*, 185, 189, 190.

Malice is made out by showing that the proceeding was instituted from any improper motive. *Cooley on Torts*, 185; *Harpham v. Whitney*, 77 Ill. 32. Whether malice is proved or not is a question for the jury. *Harpham v. Whitney*, 77 Ill. 32; 2 *Greenleaf on Ev.*, Sec. 453; 1 *Hilliard on Torts*, 514.

The attorney for appellants admits that it is a well established principle of law that the advice of a justice of the peace is no defense to an action for malicious prosecution, but requests this court to say that the advice of a justice of the peace should be allowed by the courts to be set up as a defense.

In actions for malicious prosecutions it has been held to be competent for the defendant to prove, in order to establish the fact of probable cause, that in prosecuting the plaintiff on a criminal charge, he acted on the advice of a regularly licensed attorney, reputable in character, and considered competent to give legal advice on all matters of law. *Cooley on Torts*, 183.

Advice of a state's attorney is not even sufficient, the court saying in *Roy v. Goings*, 112 Ill. 665 :

"We are not prepared to hold that the mere fact that an attorney, holding a commission as state's attorney, must be held to be an attorney in good standing for skill, prudence and fairness." And in that case the court refers to the case of *Murphy v. Larson*, 77 Ill. 172, in which the court uses this language :

"There is no reason for enlarging the rule. It would be a dangerous practice, not justified by any public exigency, to permit a party to say, in justification for commencing a criminal prosecution that might injure or destroy the reputation of the party accused, that he acted upon the advice of a person not a lawyer, however honestly the advice may have been given and received."

That the advice of a justice of the peace is no protection, see *Williams v. Vanmeter*, 8 Mo. 339; *Cooley on Torts*, 184;

Rosenberg v. Hart.

Burgett v. Burgett, 43 Ind. 79; Olmstead v. Partridge, 16 Gray, 383.

“He may take such advice in aid of his own judgment but can not afford him any protection.” Murphy v. Larson, 77 Ill. 172; Cooley on Torts, 184.

GARNETT, P. J. This was an action for malicious prosecution, judgment being given in the Circuit Court for the plaintiff, and the defendants appeal.

The court instructed the jury that if they believed from the evidence the defendants, or any of them, were guilty of the arrest and prosecution, and that such arrest was malicious and without probable cause, then vindictive damages might be given. There are two fatal errors in this instruction. No principle of law warrants a recovery against three defendants if only one is found guilty from the evidence. Blackman v. Blom, opinion filed in this court April 3, 1889.

The instruction tells the jury that the defendants may be found guilty if the arrest was made maliciously and without probable cause. Suppose, however, the prosecution did not terminate in acquittal? The jury was not informed that an acquittal was one of the conditions of recovery by plaintiff. There was a strong tendency in the evidence to prove that the prosecution came to an end through a compromise between the parties. If that was the manner in which the matter was disposed of there can be no recovery, as a compromise is not equivalent to acquittal. Emery v. Ginnan, 24 Ill. App. 65; Fadner v. Filer, opinion filed in this court December 7, 1888.

The errors in this instruction are not cured by anything appearing elsewhere in the record. We think the Circuit Court committed no error in allowing the restoration of a part of the bill of exceptions showing that all of the evidence was embraced therein. The judgment is reversed and the cause remanded.

Reversed and remanded.

THOMAS B. BOYD

V.

JOHN DULLAGHAN.

Agency—Real Property—Exchange of, for Personality—Recovery of Commission—Evidence.

One who attempts to act as the agent of both parties to a transaction without disclosing that fact to his principals, is precluded from recovering compensation for his services.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. CUNNINGHAM & KEILY, for appellant.

Mr. M. P. BRADY, for appellee.

MORAN, J. Appellant brought this action to recover commissions for services as a real estate broker, rendered to appellee in and about the exchange of certain hotel and opera house property which was owned by appellee and situated at Portage, Wisconsin.

Appellee placed the property in the hands of appellant to be sold or exchanged, in the latter part of 1885, and appellant proceeded to advertise the property. In January, 1886, one O'Brien, who was in business at Chicago, placed in appellant's hands a stock of goods to be sold. Appellee arranged to pay appellant five per cent. commission if he sold or exchanged his property, and O'Brien agreed to pay a like commission for a sale of his stock of goods. Shortly after O'Brien placed his stock with appellant to sell, appellant invited appellee to come to Chicago, and when he came in response to the request, took him to O'Brien's store and introduced him to O'Brien and set them in negotiation for the

23	266
50	427
33	266
92	146

exchange of their respective properties. O'Brien accompanied appellee to Portage to examine the property, and a contract was finally made between them for an exchange which, however, O'Brien refused to carry out, and the negotiations between them ceased.

In January, 1887, without the knowledge of appellant, O'Brien and appellee came together again and made a different contract, by which appellee exchanged his said property and some other for the stock of goods in O'Brien's store. The case was disposed of in the Circuit Court by the court striking out appellant's evidence, and instructing the jury to find for appellee. The action of the court must be sustained. There is no evidence that appellee had any knowledge that appellant was acting as the agent of O'Brien until after the transaction between O'Brien and appellee had been fully closed. One who attempts to act as the agent of both parties to a transaction without disclosing that fact to his principals, is precluded from recovering compensation for his services.

In Meham on Agency, Sec. 972, it is said: "To be secretly in service of the opposing party, while ostensibly acting for his principal only, is a fraud upon the latter, and a breach of public morals which the law will not tolerate. If, therefore, each of the parties to a transaction was entirely ignorant of the broker's relations to the other, such double service on the part of the broker will defeat his right to recover commissions from either of them. If one of the parties only was ignorant he will certainly be absolved from the duty to pay commission."

The cases cited by the author, some of which are referred to in the brief of appellee's counsel, fully support the doctrine of the text. See also *Kronenberger v. Fricke*, 22 Ill. App. 550, where the rule was applied by this court.

As one good ground is sufficient for the affirmance to rest on, it is unnecessary to discuss other questions argued by counsel in the briefs.

Judgment affirmed.

ABRAHAM ESPEN

V.

LOUIS H. ROBERTS ET AL.

Negligence—Co-tenants—Damage by Water—Instructions.

An instruction, though correctly stating a proposition of law, should not be given, in the absence of evidence upon which it can be based.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MR. ISRAEL COWEN, for appellant.

We assert that there is not a scintilla of evidence showing, or tending to show, that the plaintiff or any of his employes caused the damage complained of, and none will be claimed to exist.

Under the rules thus far laid down by the Supreme Court, and this court, the giving of an instruction predicated on evidence not in the record, is such an error as will reverse. *Village of Evanston v. Lynch*, 1 Ill. App. 63; *Pease v. Catlins*, Ill. App. 88; *Hunting v. Baldwin*, 6 Ill. App. 547; *Irwin, Adm'r, v. Atkins et al.*, 8 Ill. App. 221; *Moon v. Jennings*, 8 Ill. App. 168; *Covert v. Nolan*, 10 Ill. App. 629; *Champion Co. v. Bradley*, Id. 328; *Hubner v. Feige*, 90 Ill. 208; *C., B. & Q. R. Co. v. Harwood, Adm'r*, 90 Ill. 425; *The Chicago West Division R. Co. v. Mills*, 91 Ill. 39; *Heir v. People*, 102 Ill. 540.

MR. F. C. HALE, for appellees.

GARY, J. The appellant occupied a part of the second floor of a store. The appellees occupied the whole of the fourth floor. On this floor the appellees had a tank to which a pipe from the city water supply led. There was a stop-cock in the pipe on the appellees' floor, but it was left open. On the morning of May 6, 1887, it was discovered that during the

Holden v. Terhune.

preceding night this tank had filled and overflowed, and damage been done to the appellant's goods, for which he brought this action. There is no evidence connecting the appellant, by the remotest allusion, with the management of this water supply.

The first instruction on behalf of the appellees is: "If the jury believe from the evidence that the damages sustained by the plaintiff were caused by the negligence of the plaintiff or by the negligence of any employe of the plaintiff, the jury must find for the defendants."

I wish to disavow in the strongest terms any suspicion that the judge of the Circuit Court ever thought of the sinister effect this instruction might have upon the jury. As a proposition of law it is correct, but there is not a scintilla of evidence to base it upon. With no other knowledge of these parties than such as may be inferred from their names, it is reasonably certain that the appellant is a Jew, and the appellees are not. A jury so predisposed, might have taken this instruction as a justification for the verdict against the appellant, because of, and only because of, his race. There is, therefore, in this case more than common reason for holding that an instruction, referring to the evidence, when there is none, as the basis for the action of the jury, is erroneous. The cases on that point are very numerous, and readily found in the digests.

The judgment must be reversed and the cause remanded.

Reversed and remanded.

NEWTON P. HOLDEN

V.

EDGAR TERHUNE ET AL.

Mortgages—Foreclosure—Payment in Part—Residue—Decree.

Upon a bill to foreclose a mortgage this court declines to interfere with the finding of the trial court, that the son of the mortgagee had received payment in part on account of the same, and that he was authorized so to do.

[Opinion filed June 14, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Mr. F. C. CALDWELL, for appellant.

Mr. EDGAR TERHUNE, *pro se*.

GARY, J. This is a bill to foreclose a mortgage for \$500, borrowed by the appellee above named from the appellant, April 17, 1882, for the term of three years, for which a note secured by the mortgage, was given. The mortgagor and a son of the appellant were partners as practicing lawyers. Upon the preponderance of the evidence the Superior Court found that, April 3, 1884, the mortgagor paid to the appellant \$300 on account of the note and mortgage. This money, if paid, was not in fact paid by the mortgagor into the hands of the appellant, but into those of his son. The brief on the part of the appellant concedes, "On the part of the appellant, we can not, in the face of the evidence, deny the bare fact that some money passed between Terhune and his partner at the time specified," but insists that such payment, if made, was without authority from the appellant.

The son of the appellant, partner of the mortgagor, died December 1, 1884. In June, 1885, at an interview between the parties, according to the only testimony upon the subject, when the mortgagor claimed that he had paid this \$300, the appellant said that if he had paid it it was all right, but he did not believe that it had been paid, and called for a receipt.

As corroborative of other evidence, perhaps not sufficient in itself, on the part of the appellees, of the authority of the son to receive the money, this declaration of the appellant, the fact of payment being proved, justified the finding of the court that the son had authority from the appellant to receive it.

The questions in the case all relate only to the credibility of witnesses and the preponderance of evidence. The decree for the unpaid residue of the debt only, is affirmed.

Decree affirmed.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY

v.

MARY E. HINES, ADMINISTRATRIX.

Master and Servant—Railroad Watchman—Personal Injuries—Practice—Evidence—Instructions—Arrest of Judgment.

38	271
43	419
38	271
50	166
50	588
38	271
55	328
33	271
66	355

1. The refusal of an instruction can not be complained of where a special finding of the jury specifically denies the hypothesis thereof.

2. A willful neglect of means to save the lives and limbs of servants performing dangerous service, from needless peril, constitutes gross negligence.

3. In an action for the recovery of damages for the death of a railroad employe through the alleged negligence of the company, this court holds, upon the allegation that the declaration is insufficient in not alleging knowledge by the defendant, and want of knowledge by the deceased, of the defects named, as to the first objection, that the faults, if any, touching the language of the declaration, were faults in construction, and that no such averment was necessary; and as to the second objection, that the want of an averment of such lack of knowledge can not be complained of.

4. In the case presented, this court declines to interfere with a verdict for \$5,000, in behalf of the plaintiff.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. W. H. LYFORD, for appellant. a

Mr. WILLIAM H. BARNUM, for appellee.

GARY, J. This is an action under the statute by the appellee, for the death of her husband, John Hines, by the alleged negligence of the appellants. He was a night switchman employed by them, and was killed about ten o'clock on the night of May 6, 1887. There was a demurrer to the declaration, which the records show was overruled on motion of the appellee. They afterward moved in arrest of judgment, and

now allege as error that the declaration is insufficient in not alleging knowledge by the appellants, and want of knowledge by the deceased, of the defects which are alleged to have been the cause of the accident resulting in his death.

It is held in this State, contrary to the rule laid down in Tidd's Pr., 740, 918, that if a declaration is so totally defective as not to support the judgment, that it may be availed of by a motion in arrest, even after a demurrer thereto has been overruled, and the defendant has pleaded over. Stearns v. Cope, 109 Ill. 340. This case overrules, without alluding to, the prior cases of DeWolf v. McGinnis, 106 Ill. 553; Quincy Coal Co. v. Hood, 77 Ill. 68, and Am. Ex. Co. v. Pinckney, 29 Ill. 392.

But the rule of practice based upon the stickling of the court for its own dignity (see Tidd as cited) never applied to an appellate court, which, on a writ of error, would always examine as to the sufficiency of the declaration, as an original question. 2 Tidd's Pr., 1169; Kipp v. Lichtenstein, 79 Ill. 358, and cases there cited; Chicago v. Turner, 80 Ill. 419, where there had been in fact a demurrer to the declaration overruled, though the report does not show it.

If, therefore, the declaration was fatally defective, and not aided by the verdict, the judgment would have to be reversed. Now, as to a lack of an averment of knowledge by the appellants, although the language of the declaration is that they "permitted the ties of its said railroad track to be and remain above the surface of the ground and the space between the said ties were not filled in," in the first count, and "permitted a wide space to exist between the ties of said track and the switch bar" in the second, it is apparent that if these were faults, they were faults in construction, and the case of C. & N. W. R. R. Co. v. Sweet, 45 Ill. 197, is in point that no such averment in such case is necessary.

As to the lack of averment of want of knowledge by the deceased, though some American cases can be found that support the objection, the course of pleading as shown by the English cases, is against it.

In the English cases the question has been elaborately discussed and considered, while the American cases show but

little attention to it. *Brizzell v. Laconia Mfg. Co.*, 48 Maine, 113; *M. R. & L. E. R. R. Co. v. Barber*, 5 Ohio St. 541; *Watling v. Oastler*, 23 L. T. R. 815; *Mellors v. Shaw*, 1 B. & S. 101 E. C. L. 437, and cases there cited. 2 *Thomp. Neg.*, 1050 *et seq.*

The question is analogous to the one frequently made upon the averment of due care by the plaintiff, in an action for negligence by the defendant. While, as a general rule, the proof must show such care, the declaration need not aver it. *W., St. L. & P. Ry. Co. v. Shacklet*, 105 Ill. 364; *C. & N. E. Ry. Co. v. Cass*, 73 Ill. 394. In *Bass v. C. B. & Q. R. R. Co.*, 28 Ill. 9, where a demurrer had been sustained below to a declaration that did not contain such averment, and its absence was urged as a ground for the judgment, the same judge who had said in *Hazzard v. C. B. & Q. R. R. Co.*, 26 Ill. 373, that the declaration there, was bad for such a lack, reversed the judgment without alluding to what he had said before, or even to the point at all. It is true that the case of *Bass* did not call for any decision on that question as to instructions.

Plaintiff's instructions given :

1. The court instructs the jury as a matter of law that the defendant company was bound to use all reasonable care and diligence to furnish the servants engaged in switching its cars with safe road-bed and machinery at its switches, and it is for the jury to determine from the evidence whether said duty was performed by said company, or whether it was negligent, and if so, how negligent it was in the performance of that duty. (*Given.*)

2. Even if the jury believe from the evidence that the deceased, John Hines, was guilty of some negligence at the time he was killed, still if the jury further believe from the evidence that he was using ordinary care under the circumstances, and that defendant company was guilty of negligence as charged in the declaration, and that the negligence of said Hines was slight in comparison with such negligence of the defendant, and that the defendant's negligence was gross in

comparison, and that John Hines was killed through and by reason of such gross negligence on the part of the defendant (if the jury find that it was guilty of gross negligence), then the plaintiff is entitled to your verdict. (*Given.*)

Defendant's instructions given:

1. The only ground on which the plaintiff bases her claim for recovery in this case is, the defendant's failure to fill in the space between the ties *and under* the switch-bars, was negligence. If she has failed to prove this, and if, on the contrary, the evidence shows that it would have been impracticable to fill in those spaces, that it would have seriously interfered with the operation of the track in question, and that *in the management and operation of railroads it is reasonably proper or necessary* to leave spaces between the ties at such places, substantially the same as in the defendant's track in question, then your verdict must be for the defendant. (*Given.*)

2. Even if the defendant permitted its track to be in defective condition, as alleged in the declaration, if these defects were known to the deceased, and he still continued to work there without objection, and without any promise that the track would be made safer, the plaintiff can not recover in this case. It is the privilege of an employe, when he knows that his work is dangerous, either to quit or require that the work be made safe. If he does not quit and does not object to the danger he assumes the risk of injury from the dangerous work, and he must bear the consequences. His representatives can not complain against the employer in such a case. (*Given.*)

3. The jury are instructed that the defendant was not bound to furnish an absolutely safe track for its employes to work on. If the track in question was reasonably safe and in as good condition as ordinarily prudent railroad companies kept their switch-yard tracks at such places, then the plaintiff can not recover and your verdict must be for the defendant. (*Given.*)

4. If you find from the evidence that the track in question was in the same condition in which it had been during all the

time that the plaintiff's husband had been working there, that he knew the condition of the track in question all the time, and made no objection to working on it, but voluntarily continued to work for several weeks and up to the time he was killed, without any promise from the defendant that the track would be changed, then the law presumes that the plaintiff's husband assumed the risk of injury by reason of the condition of the track, and the plaintiff can not recover for such injury. (*Given.*)

Defendant's instruction refused:

5. If the plaintiff's husband knew the condition of the track where the accident occurred, or by the exercise of ordinary care could have known its condition, then the plaintiff can not recover in this action. (*Refused.*)

The appellants object to the first of the foregoing instructions, that it does not confine the jury to the consideration of the special defects which are alleged in the declaration. It is to be observed that this instruction does not profess to tell the jury upon what grounds the appellee might recover. The evidence of any other defects than such as were alleged in the declaration was very slight, and seem to have attracted no attention from anybody during the trial, and the first instruction for the appellants definitely stated the grounds of the action and confined the attention of the jury to them. To the second it is objected that there was no evidence of gross negligence by the appellants. The consideration of this objection requires some review of the evidence, but before proceeding to that it is convenient to say that the appellants' refused instruction is wrong, by using the word "could" instead of "would," and besides, in answer to a special question, the jury have specifically denied the hypothesis of that instruction, so that the refusal of it could have done no harm.

The deceased worked for the appellants as a night switchman; in so doing he carried a lantern; while his hours of labor included some daylight, which was becoming longer as the spring advanced, yet it did not appear that he had ever seen the place of the accident by daylight; he had been in that employment about six weeks, and the evidence tended

to show that he was a careful man; and that his death came by stumbling upon the track while about to couple a moving car to a still one, so that he fell and the car ran over him. He had been in similar employment upon other roads for nine years, and one of the complaints of the appellants, but which the record does not quite sustain, is, that they were not permitted to show how, in general, other roads construct their tracks at switches. In fact, the witness whom they were not permitted to examine on that subject, on cross-examination was recalled by them and fully examined upon it. The other instance cited by them would require considerable space to make clear, as could easily be done. The whole case comes to this: Is the evidence of such a character that the court should not permit the verdict of the jury to stand?

Where this switch was the space between the ties of the track was not filled up with ballast. The rails of the switch were held at the right distance from each other by iron rods clamped to the rails, and space must be left for those rods to move in, without rubbing the surface below them. The rods and the ties are substantially on the same level. At some switches the space between the ties is filled as much as may be without obstructing the movement of the rods. At this there might have been three or four inches more filling without that effect. With such filling it is and was well known to be safer to work upon, especially in the night. The business is one of danger at the best.

It is not denied that the first instruction on the part of the appellee states the law as to the duty of the appellants. The switch was intentionally constructed as it was. It is not an abuse of language to call a wilful neglect of means to save the limbs and lives of the men who perform this dangerous service from needless peril, gross negligence. Observation and experience teach that legal coercion is necessary to induce large employers of labor to do what is really practicable, to lessen the dangers which attend the services.

The legislation in England and America as to mines and machinery, municipal ordinances as to elevators, fire escapes, stairways and much else that might be referred to, all spring

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out of the necessity of compelling precautions for the safety of persons in subordinate positions, that would not otherwise be adopted. And the verdicts of juries, often going too far, are in line with such municipal and State legislation. If this view is correct there was no error in submitting to the jury the question of gross negligence by the appellant. Whether the deceased had any previous knowledge of the manner in which the switch was constructed, whether his death was occasioned by it, whether he was exercising due care for his own safety, were all questions of fact. The jury is the tribunal intrusted by the law with the determination of them; and even under a system which still leaves upon the court the duty, and therefore the responsibility, of aiding the jury in reaching a right conclusion upon the facts in a case like this, that determination would be final. *Mellors v. Shaw, supra.*

There is no error in the record and the judgment is affirmed.

Judgment affirmed.

SANGAMON COAL MINING COMPANY, FOR USE, ETC.,

V.

E. H. C. RICHARDSON ET AL.

*Garnishment—Chap. 62, R. S.—Unpaid Balance on Shares of Stock—
Inadequate Consideration—Receipt in Full—Fraud.*

1. A garnishment proceeding can only reach the debt which the judgment debtor could recover by action at law.

2. Proceedings of this character will not lie on the part of the creditors of a corporation to recover the unpaid balance on shares of stock where the amount received as payment in full was much less than the face value thereof, until after the agreement to that end shall have been set aside by bill in equity.

[Opinion filed June 14, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. CHARLES E. TOWNE, for appellant.

38	277
59	392
38	277
07	533
38	277
73	818
73	820
38	277
73	306

Mr. FREDERIC ULLMANN, for appellees, Richardson, Vehmeyer and Tracy.

The Sangamon Coal Mining Company, having accepted the property in full payment of the subscriptions to its capital stock, has no right of action against the subscribers on their subscriptions, and the garnisheeing creditors have no other or greater rights than the judgment debtor. This general position was held in *Crownover v. Bamberg*, 2 Ill. App. 162; *Netter v. Board of Trade*, 12 Ill. App. 607; *Webster v. Steele*, 75 Ill. 544; *Richardson v. Lester*, 83 Ill. 55.

This proceeding is, in form as well as in legal effect, an action by the Sangamon Coal Mining Company for the use of the judgment creditors against the garnishees, and on the principle laid down in the authorities above cited can not be maintained. "The principle is that process of garnishment, being a legal proceeding, given by statute, only entitles a party to recover such indebtedness as could be recovered by an action of debt or *indebitatus assumpsit*, in the name of the attachment or judgment debtor against the garnishee." *Webster v. Steele*, *supra*, at p. 546.

The eighth section of the act concerning corporations (under which this proceeding is had) only authorizes the garnishment of "the balance unpaid by such stockholders upon the stock owned by them," and does not in any way militate against the rule above laid down.

The case of *Osgood v. King*, 42 Iowa, 478, cited by appellant's counsel, arose under a peculiar statute of Iowa, which gave creditors a remedy against stockholders very similar to that by creditor's bill in chancery; and the other cases cited by him—*Union Mutual Life Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, *Wenzell v. Alling*, in this court, unreported, and *Ogilvie v. Ins. Co.*, 22 How. 387—were creditors' suits where the *bona fides* of the payment of the capital stock was attacked by bill in chancery; and they are, therefore, not in point in this case.

The payment of their subscriptions by the subscribers for stock was made in good faith, in property at fair value, and was a good and valid payment.

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The answers of the garnishees alleged that the property turned over was worth \$300,000, and that the payment was made in good faith. The answers were *prima facie* true; the burden of disproving them was on the plaintiffs. Their only testimony was that of Starne, who testified that in his judgment the tangible property was worth about \$100,000. As has already been said Starne admitted that the property had been earning a net income of ten per cent on \$300,000, and that all parties acted in good faith in turning over the property, including the good will of the business, at \$300,000. Tracy testified that in his judgment the property was worth fully \$300,000, sustaining fully by his evidence the answers of Dresser and himself as to value.

The plaintiff, therefore, failed on the question of fact. The trial court could not, under the evidence, have done otherwise than find against them on that question.

Peck v. Coalfield Coal Co., 11 Ill. App., was a case very much like the present, where the subscriptions to stock had been paid in property, and an attempt was made to hold the subscribers, but the evidence showed that the payment had been made in good faith and the attempt failed. The opinion is somewhat lengthy, and we forbear quoting from it, but commend its perusal to the court.

Among other points the opinion lays considerable stress on the fact that at the time the payment was made the judgment creditor had no claim against the company and was not a creditor.

"Before he gave it credit he should have investigated its affairs, and could have seen by an examination of the books that appellant had fully paid for his stock, and owed nothing for or on account of his subscription."

The same fact exists in this case. The stock was paid up in January, 1882. The indebtedness to these judgment creditors accrued in January, 1887, five years afterward.

Authorities are numerous to the effect that a subscription to the capital stock of a corporation may be paid for in any property which the corporation can lawfully purchase. If the property is accepted as payment at a valuation made in

good faith, the corporation and its creditors are bound, even though the valuation be excessive. It is a question of good faith. 2 Morawetz on Corporations, Sec. 825; Thompson on Liability of Stockholders, Sec. 134; Phelan v. Hazard, 5 Dillon, 45; Young v. Erie Iron Co., 31 N. W. Rep. 814; Coit v. North Carolina Gold Co., 14 Fed. Rep. 12.

GARNETT, P. J. Judgment having been rendered in favor of Charles W. Merriam, Isaac S. Collins and George W. Dexter against the Sangamon Coal Mining Company, upon which an execution was duly issued and returned unsatisfied, this proceeding in garnishment under Chap. 62 R. S., was commenced in the name of the company for the use of the judgment creditors, against the appellees. The purpose of the garnishment is to recover from appellees certain liabilities which are alleged to be due from them on shares of stock which they own in said company. Appellees do not deny that they are the holders of the shares of stock, but in defense they set up and prove that when the stock was originally subscribed the entire capital stock was subscribed by the parties who paid therefor, by conveying and turning over to the company certain property and business interests, which were accepted and received by the company in full payment of such subscriptions. The value of what was thus paid is matter of dispute, and although it was clearly of a substantial character, for the purpose of this case it may be admitted that the evidence gives good reason to believe that it was not worth more than one-third of the face of the stock. The inadequate value of the consideration given by the stockholders is relied upon by appellant as ground for holding garnishees on their stock liability. Can they be so held in this proceeding? That is the sole question for decision. Garnishment is a proceeding at law, and only debts which the judgment debtor could recover by action at law can be reached by process of garnishment. In this respect the statute remains as it was when Webster v. Steele, 75 Ill. 544, Richardson v. Lester, 83 Ill. 55, and Netter v. Board of Trade, 12 Ill. App. 607, were decided. Those cases hold the negative of the proposi-

Sangamon Coal Mining Co. v. Richardson.

tion and are conclusive on the point. When the company received the consideration mentioned in full payment for the stock it no longer had any right of action against the stockholders. Their liability was to the creditors of the company alone, and even the creditors could make them respond only after the discharge given by the company was set aside by bill in equity.

In *Scovill v. Thayer*, 105 U. S. 143, it appeared that when the shares of stock were subscribed for, the company agreed with the subscribers to accept a certain percentage of the face value thereof, and that agreement was carried out, certificates of full paid shares being issued. The company becoming bankrupt and the assignee seeking to recover the amounts unpaid on the stock, the holders of the shares set up a defense presenting directly the question now before us, which the court disposed of in these words: "The stock held by the defendant was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter, or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter. If the company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock which had been satisfied by discount, according to their contract, they could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the company. * * * In this case there was no obligation resting on the stockholders to pay at all until some authorized demand in behalf of creditors was made for payment. The defendant owed the creditors nothing, and he owed the company nothing save such unpaid portions of his stock as might be necessary to satisfy the

claims of creditors. Upon the bankruptcy of the company his obligation was to pay to the assignees, upon demand, such an amount upon his unpaid stock as would be sufficient, with the other assets of the company, to pay its debts. He was under no obligation to pay anything until the amount necessary for him to pay was at least approximately ascertained. Until then his obligation to pay did not become complete. But not only was it necessary that the amount required to satisfy creditors should be ascertained, but that the agreement between the company and the stockholder, to the effect that the latter should not be required to make any further payments on his stock, should be set aside as in fraud of creditors. No action at law would lie to recover the unpaid balance due on the stock until this was done." The same rule was held in *Peck v. Coalfield Coal Co.*, 3 Ill. App. 624.

The last case was reversed in the Supreme Court, but without affecting this question. There is no error in the judgment and it is affirmed.

Judgment affirmed.

ADDIE ROTHSCHILD

v.

CHARLES J. BRUSCHKE ET AL.

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73 46

Negotiable Instruments—Note—Suit on Parties—Pleading—Amendment.

The filing of a new declaration in the name of the person to whom a note was indorsed, together with his substitution as party plaintiff after the institution of suit thereon in the name of the indorser, will not warrant a judgment in behalf of the indorsee.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Rothschild v. Brusckke.

Messrs. FLOWER, REMY & HOLSTEIN, for appellant.

Messrs. ALLAN C. STORY and FRED. W. STORY, for appellees.

GARNETT, P. J. This action of assumpsit in the Circuit Court was brought originally in the name of S. Kuhn and others as plaintiffs, against the appellees. The foundation of the suit was a promissory note executed by appellees to the order of Addie Rothschild. The note was indorsed and delivered by her to S. Kuhn & Sons, the original plaintiffs, who were the legal and equitable owners and holders of it when this suit was commenced.

Some time after the beginning of this suit S. Kuhn & Sons re-transferred the note to appellant, and leave was then given in the court below to amend by substituting the name of appellant as plaintiff in place of S. Kuhn & Sons, and the same was done, a new declaration being filed with her name appearing therein as plaintiff. The case was tried by the court without a jury; finding and judgment for defendants, and appeal by plaintiff. It is a well settled rule that the plaintiff, to recover, must be the legal owner of the cause of action. 1 Chitty on Pleadings, 2; Chadsey v. Lewis, 1 Gilm. 153; Kyle v. Thompson, 2 Scam. 432; Lohman v. Cass Co. Bank, 87 Ill. 616; Sweet v. Garwood, 88 Ill. 407. At the time the suit was commenced Kuhn & Sons were the legal owners of the note. The suit was properly in their names. It follows that she could not have maintained the action if it had been originally brought in her name. Otherwise she and Kuhn & Sons might have maintained separate actions at the same time against the makers when the legal and equitable title to the note was in Kuhn & Sons only. Her position is not improved by her acquisition of the title after the suit was commenced. She comes into the case with the same right she would have had if the suit had been commenced in her name. C. & N. W. Ry. Co. v. Jenkins, 103 Ill. 588; McCall v. Lee, 120 Ill. 261; Kenyon v. Sutherland, 3 Gilm. 104; Burnap v. Cook, 32 Ill. 168.

The judgment is affirmed.

Judgment affirmed.

MICHAEL MYERS AND CORNELIUS GRIFFIN

v.

ANNA MAHER.

Real Property—Cloud—Judgment—Bill to Remove—Unrecorded Deed—Resulting Trust—Homestead—Dower—Subrogation.

Upon a bill filed to remove the lien of a judgment obtained against the husband of petitioner as being a cloud upon her title to certain real estate, this court holds that the petitioner was not in possession of the premises in question at the time said judgment was obtained under an unrecorded deed, the same having been filed for record after such lien attached, but that she would be entitled, upon sale thereof under execution, or upon her own petition, to receive certain sums paid by her to liquidate mortgages thereon, and that her claim therefor should properly take precedence of liens accruing subsequently to such payments.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Messrs. YOUNG & MAKEEL, for appellants.

In this State a judgment creditor is protected under the conveyancing act as a purchaser, and the lien of his judgment attaches to whatever interest the record discloses to be in the judgment debtor at the entry of the judgment, as against every other claim of which the creditor has no notice. *Martin v. Dryden*, 1 Gilm. 205, 206, 217, 218, 219; *Massey v. Wescott*, 40 Ill. 163; *McFadden v. Worthington*, 45 Ill. 366.

Property standing of record in the name of the husband can not be regarded as held in adverse possession by the wife, when it is jointly occupied or used by both husband and wife. *Stanton v. Kirsch*, 6 Wis. 341; *Slocum v. Slocum*, 9 Ill. App. 143, 144.

Therefore no claim can be made in this case that the complainant held possession adverse to that of her husband, of that part of the building occupied by both of them, namely, of the flat in which they resided.

Evidence to sustain a resulting trust must be very clear, and is always received with great caution. *Mahoney v. Mahoney*, 65 Ill. 407.

With so much for preface we come to the two main questions in the case. Was there a resulting trust of the whole property? And was there such adverse possession by the wife as put the judgment creditors upon notice of her resulting trust? The correct position, we claim, will be found in the negative of both propositions.

There was no resulting trust of the whole property. The decree in this respect is against the facts, even as they appear upon complainant's own showing.

Mr. Maher paid \$1,200 for the lot in 1883. Of that amount, there was furnished on behalf of complainant, the principal sum of \$500, with whatever interest may have accrued upon it at the time it was turned over. The evidence, however, leaves that interest an unknown quantity. Neither dates nor stipulated rate is furnished, nor does it appear that any fixed amount was at any time settled, or agreed upon, as the amount to be allowed for interest. But passing that weak point in complainant's case, and allowing the highest amount anywhere claimed as interest, namely \$200, and adding that to the principal of \$500, we have \$700, the largest amount to which complainant had any claim in the hands of Mr. Maher at the time when he bought the lot. It is said that he paid for the lot out of the loan from Greenebaum upon the Seymour street lot, but that was his own lot. The extent of the claim of Mrs. Collins upon it was an indebtedness of (at the outside) \$700. This indebtedness was transferred to complainant, and is the original basis, and the only original basis, of her claim to be entitled to a resulting trust. She had no further interest in, or right to, the Greenebaum loan. Besides, the Greenebaum loan was but \$1,000, whereas Mr. Maher paid \$1,200 for the lot in question. Some of his own money was therefore used to purchase it. Of the \$1,200 which was used to buy the lot, \$500 of it was at the very least the money of, and was furnished out of his own funds by Mr. Maher. The complainant could not, therefore, in any aspect of the case,

have a resulting trust in the lot, at the time of its purchase, to exceed a part; and that part could not have exceeded seven-twelfths of the whole. Nor could this aliquot interest be afterward varied by her contributing more than her quota (had she so contributed, but when examined it will appear that she contributed less,) toward improving and preserving the property. *Perry v. McHenry*, 13 Ill. 227; *Latham v. Henderson*, 47 Ill. 185.

There was no such adverse possession by her as put the judgment creditor upon notice of her claims.

About the facts bearing on this point there can be no controversy. They are made out by the testimony of the complainant, and some of the tenants, called by her as witnesses. She let the two flats not occupied by herself, her husband and their children, to tenants who paid the rent to her and who applied to her for repairs when needed; and she used the rents to support the children. Whether any written leases were made does not appear, nor does it appear whether she gave any written receipts for rents paid.

In this connection it is necessary to bear in mind that Mr. Maher, in person, transacted the business of buying the lot and erecting the building; that the title stood of record in his own name; that he resided in part of the building, occupying it jointly with his wife, the complainant; and that she applied the rents received to his business, that is, in supporting his children, which certainly was his business. Suppose an inquiring purchaser or incumbrancer had ascertained all these facts, would he be expected to infer therefrom that she held adverse to her husband? Would any ordinarily careful person, knowing these facts and taking into account the family relations between the parties, hesitate to extend credit to the husband on the strength of his being the owner of the property? A wife's possession as against the husband's creditors is difficult to establish. *Harrison on Contracts of Married Women*, Sec. 575.

"The family relation is such, and the probabilities of ownership so great on the part of the husband, that a plain and satisfactory case should be made out before the wife can be

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permitted to hold property against honest creditors." *Earl v. Champion*, 65 Pa. St. 195.

Where husband and wife are living together, "possession does not furnish the same test as to title between them, as it would when applied to strangers." *Stanton v. Kirsch*, 6 Wis. 341.

To constitute adverse possession there must be such appropriation as will apprise the community in the vicinity that the land is in the exclusive use of the person claiming the possession. *Morrison v. Kelly*, 22 Ill. 610, 623.

Notice by possession to be sufficient must be so open and visible as to arrest attention, and as to apprise the world of the occupancy, and of who the occupant is, or how he can readily be ascertained. It must be exclusive. A user in common with others is not hostile in character. *Truesdale v. Ford*, 37 Ill. 214; *Stone v. Cook*, 79 Ill. 425, 426, 429.

This doctrine is equally applicable whether she rely on the resulting trust or upon the unrecorded deed. The nature of the possession was insufficient, under the authorities, to support either title. As to that deed, it seems out of the question that it can cut any figure, at any rate. It was not recorded until after the entry of the judgment. It never took effect for want of delivery. *Herbert v. Herbert*, Breese, 354; *U. M. L. Ins. Co. v. Campbell*, 95 Ill. 231; *Benneson v. Aiken*, 102 Ill. 287. Unless it can be regarded as a deed of gift or family settlement. But, in that case, it would be in fraud of the rights of creditors; and an effectively adverse possession would not support it.

Messrs. GOLDZIER & RODGERS, for appellee.

MORAN, J. The bill in this case was filed to remove the lien of a judgment obtained by appellants against the husband of appellee, from a certain lot and the improvements thereon, as being a cloud on appellee's title to the same.

The fact on which the relief asked is sought, are as follows: In October, 1882, William H. Maher, the husband of appellee, was the owner of a certain lot in Cossit's addition to Chi-

cago, and was owing to Margaret Collins, the mother of appellee \$500, three hundred of which was secured by mortgage on said Cossit street lot, and two hundred of which was without security. Maher wished to receive more money on said lot, and applied to Margaret Collins to release her mortgage upon it, which she did upon condition Maher should agree that he would put the money which he owed to her into a home for appellee. This he agreed to do, and the mortgage was thereupon released. In the summer of 1883, said Maher purchased the lot here involved, situated on Macalester Place, in Chicago, for the sum of \$1,200, and in May, 1884, he erected a building thereon which cost about \$5,000, and which was divided into flats. Maher, before he bought said lot, told appellee to look at it, and asked her how she would like it there, but nothing was said about giving her the lot, and Maher took the title in his own name. He mortgaged the lot for \$300, which money went into the improvement which he placed thereon. When the building was completed, in September, 1884, appellee, with her husband and children, moved into it, and occupied the middle flat, and she rented the upper and lower flats to tenants and always collected the rents herself, her husband having nothing to do with the renting, and she always thereafter paid the taxes on the property and the interest on the mortgage out of the rents.

Appellants obtained a judgment against said William H. Maher on December 28, 1885, for the sum of \$610.72, on which execution was issued within a year. On January 12, 1886, a deed from William H. Maher to appellee, conveying the lot in question "in consideration of love and affection, and the sum of \$600," was placed on record. The deed was dated and acknowledged October 7, 1885, but was never in the possession of appellee, and she knew nothing of it till she found it in her husband's papers after his death. He died December 27, 1886. The Circuit Court granted the prayer of the bill and removed the judgment as a lien on appellee's title.

To sustain this decree it is contended that appellee was in possession of the premises under an unrecorded deed, at the time appellant's judgment was obtained. This contention can

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not be sustained. If it be assumed that such a possession as appellee had by living upon the premises with her husband, would be notice to creditors and purchasers of an unrecorded title derived from him (a question on which we express no opinion), it must be admitted that there could be no notice of title before the inception of the title itself. The deed could not take effect until it was delivered, and it is very clear that it was delivered at the earliest, when it was filed for record, some fourteen days after the lien of appellant's judgment attached.

It is contended, further, that there was a resulting trust in the property as it was purchased with money which was in fact appellee's, the gift of her mother, and that her residence on the property and collecting the rents thereof was notice of her equitable title. If we were compelled to decide the case on this point we should have some difficulty in holding that a resulting trust arose in favor of appellee by the transaction as shown in this record, but it is unnecessary to labor with the question, for the reason that if she had a resulting trust and such possession as she had is to be treated as notice of it, it would exist to the extent only to which she furnished the purchase money. The lot cost \$1,200, and the most she can be found to have furnished is \$700. On this assumption her equitable interest would extend to only seven-twelfths of the property. Five-twelfths would still be subject to the lien of the judgment, and hence the decree can not be sustained on this theory. 13 Ill. 233; Latham v. Henderson, 47 Ill. 185.

It is suggested that appellee's husband had assumed an obligation in consideration of the release of the Margaret Collins mortgage to buy a home and put it in the name of appellee; that he did buy this lot and put her in possession of it as a homestead, and that this was evidence of his intention to perform the obligation; and that having put her in the actual possession, and having only the legal title in himself, he was capable of receiving a delivery of the deed as her agent from himself. We can not assent to this theory. It is fraught with too much danger to creditors to find favor in the courts.

If appellee was seeking to assert a title against pure volunteers perhaps the doctrine would sustain her.

There is a prayer in the bill that if the judgment shall be found to be a lien, appellee may be subrogated to the prior liens on the property which she has discharged, and that her homestead be protected and her dower assigned, etc. There is no basis in the bill for granting such relief. Appellants have not attempted to sell under their execution, and when they shall, they will be compelled to proceed in accordance with the law with reference to the homesteads.

As it appears from the evidence that appellee has paid off mortgages upon the property with money given her by her mother, whenever the question arises she should be subrogated to the liens that she has discharged. It would seem just that she should look to the property to be reimbursed for such payments, and that her claims in that respect would take precedence of liens which accrued subsequently to those which she discharged with money arising from other sources than the rents and profits of the property in question.

The decree of the Circuit Court will be reversed with directions to the Circuit Court to dismiss appellee's bill without prejudice, unless appellee shall elect to apply to the Circuit Court for a sale of the property and a distribution of the proceeds on the basis of giving precedence to the liens to which she may be found entitled to be subrogated, and to the right of homestead under the statute.

Reversed and remanded with directions.

CHICAGO & NORTHWESTERN RAILWAY COMPANY

V.

HENRY P. BECKER AND NATHAN UNDERWOOD, FOR
USE, ETC.

Railroads—Contracts of Affreightment—Voidability—Rebates—Assignment of Claim for.

In an action against a railroad company for the recovery, for the use of

third persons, of certain rebates claimed to be due upon freight shipped, an order directed to such company by the shippers having requested such payments to be made to them, this court holds that said order referred only to sums already due or to become due on freight shipped at the date thereof; that payments by the company to a subsequent assignee was a good defense against its makers, and that as to the beneficiaries named, the same would be good so far only as in equity they were the owners of the claim sued upon.

[Opinion filed June 14, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. W. C. GOUDY, for appellant.

The principal question in this case is as to the validity of the agreement made by Becker & Underwood with the freight agent of the railway company. It was made in violation of the law which prohibits discrimination. The object was to give a preference to Becker & Underwood over other persons shipping the same kind of property to be carried between the same points. Such an agreement is against public policy, and prohibited by the rules of the common law, and also by the statute of this State. No recovery can be had on such a contract.

It is scarcely necessary to cite authorities upon this question, the principle being so well established. It is sufficient to refer to the case of L. D. & S. R. R. Co. v. Ervin, 118 Ill. 256, which is a case directly in point. The action in that case was brought by the Ervins against the railway company to recover for rebates claimed to be due them on the contracts for the shipment of grain. It was there held that such a contract came within the provisions of the act approved May 2, 1873. The court also held that such a contract was a discrimination prohibited by the common law, and for these reasons they held that there could be no recovery.

The court in that case say: "Unjust discrimination by common carriers was not sanctioned by the common law. In the case of Chicago and Alton Railroad Co. v. The People, 67

Ill. 16, this court say: 'The duties and liabilities of a common carrier are clearly defined by the common law, and have been so defined for centuries. * * * Another well settled rule of the common law in regard to common carriers is, that they shall not exercise any unjust or injurious discrimination between individuals in their rates of tolls.' In *Messenger et al. v. Pennsylvania Railroad Co.*, 36 N. J. Law, 407, it was decided that an agreement by a railroad company to carry goods for certain persons at a cheaper rate than they will carry, under the same conditions, for others, was void, as creating an illegal preference. The plaintiffs in that case had made shipments at the regular rates, under an agreement that they should be allowed such drawbacks as would bring their freights twenty and ten cents per hundred lower than the lowest rate given to any other person. The suit was to recover such drawbacks. The contract was held, upon the principles of the common law, to be illegal, and on that ground a demurrer to the declaration was sustained. Whenever the contract which the party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court, either of law or equity, will lend its assistance to give it effect. 2 Chitty on Contracts, 971. This is the well settled rule of law.

Mr. E. A. OTIS, for appellees.

In the leading case of *Wabash Railway Co. v. People*, 118 U. S. 557, to which the learned counsel of appellant, though he argued it in the Supreme Court of the United States, discreetly omits any illusion, it is squarely decided that the Illinois statute did not apply to shipments from one State into another, and that, in so far as it did assume to so operate, it was unconstitutional and void.

The legality of the contract, then, is absolutely unaffected by any statute, State or Federal, and the whole matter turns upon the question whether such a contract is void at the common law.

In the absence of any statute, the Supreme Court of Illinois has uniformly sustained just such agreements as that

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presented by this record. In the case of Toledo, Wabash & Western Railway Company v. Elliott, 76 Ill. 67, the court hold that such a contract was not illegal, even under the statute of 1871 then in force, for the reason that the carrier was to be paid the usual, customary tariff, and the matter of rebate in the charges was a matter of private agreement between the carrier and the shipper with which the carrier was required to comply, and a judgment was affirmed against the railway company for the rebate it had agreed to pay. Erie & Pacific Dispatch v. Cecil, 112 Ill. 181.

“The contract in question seems to be assailed mainly on the ground that if given effect, it would lead to great abuses and place great associations, like the defendant, completely at the mercy of its agents. * * * But the question we are considering is not a new one in this court. Toledo, Wabash & Western Ry. Co. v. Elliott, 76 Ill. 67, like the present case, was an action to recover a rebate on freight paid by the shipper for the transportation of a lot of corn under a special agreement. In that, as in this case, the contract under which the shipment was made was assailed on the ground that it was illegal and that the agent had no authority to make it. In answer to these objections this court then said: ‘There was certainly an apparent authority in the local agent to contract for carrying the grain under some special arrangement. It seems quite certain, from all the evidence, the corn was shipped over defendant’s road, on the agreement the company would allow plaintiffs a rebate on the usual charges; and having availed itself of the benefits of the contract, the company ought not now to be permitted to repudiate it, on the grounds their agent had no authority to make it. * * * The contract was to carry the grain at the customary rates. The rebate in the charges was matter of private agreement between the carriers and the shippers.’ What was then said is equally applicable here, and under the authority of that case we must hold the agreement in this valid and binding.”

In the case of I. D. & S. R. R. Co. v. Ervin, 118 Ill. 250, cited by counsel, the court reconsider the rule laid down in

Erie & Pacific Dispatch v. Cecil, 112 Ill., for the specific reason that the contract in that case was made under the subsequent statute of 1873, and the difference between the acts of 1871, under which the Elliott case was decided, and the later act of 1875, was not called to the attention of the court. The decision of the court is, that under the statute of 1873 a contract to pay rebates by a carrier was prohibited by that law, and was, therefore, illegal and void. It simply affirms the doctrine that contracts for the repayment of rebates on shipments *wholly within the State of Illinois* were prohibited by the statute, and can not be collected. We have no cause of complaint at this rule. The case under consideration lies entirely outside of it and involves rebates on shipments from interior points in the State of Iowa to Chicago in the State of Illinois, over which the Supreme Court of the United States hold, in the Wabash case already cited, the statute has no control or effect. It is true, the court in the Erwin case say that unjust discrimination by common carriers was not sanctioned by the common law, but the court are careful to base the decision on the statute of 1873, and I respectfully insist that what is intimated as to the illegality of these contracts at common law seems to be only *dicta*, and was never intended to, and did not, overrule its prior decisions, that in the absence of statute, and even under the act of 1871, such contracts would be enforced.

"In Johnson v. Pensacola and Perdido Railroad Co., 16 Fla. 623, Mr. Justice Westcott, in discussing a similar question to the one involved here, has collected many authorities bearing upon this point, and the conclusion which he reaches is: 'That as against a common or public carrier every person has the same right; that in all cases where his common duty controls, he can not refuse A and accommodate B; that all the entire public have the right to the same *carriage for a reasonable price at a reasonable charge for the service performed*, and the commonness of the duty to carry for all, does not involve a commonness or equality of compensation or charge; that all a shipper can ask of a common carrier is, that for services performed he shall charge no more than a

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reasonable sum to him.' This conclusion is sustained by numerous authorities, both English and American. *Peak v. North Staffordshire Railroad Company*, 10 H. L. 511; *Bostard v. Bostard*, 2 Show. 82; *Harris v. Packard*, 3 Taunt. 264; *Citizens' Bank v. The Nantucket Steamboat Company*, 2 Story, 35; 4 Otto, 155; 1 Chitty, Cont., 684. In *Fitchburg Railroad Company v. Gage*, 12 Gray, 393, the Supreme Court of Massachusetts held, that 'a railroad corporation is not obliged, as a common carrier, to transport goods and merchandise for all persons at the same rate,' the common law rule being that equal justice be done to all parties. 'But the equality which is to be observed in relation to the public and to every individual consists in the restricted right to charge in each particular case of service a reasonable compensation and no more.'"

GARY J. This is an action by Henry P. Becker and Nathan Underwood, composing the firm of Becker & Underwood, to recover for the use of Benjamin W. Underwood and Eben Mathews, composing the firm of Underwood & Mathews, rebates on freights of wheat from Iowa, which the appellants had agreed to pay to the appellees. One of the defenses by the appellants is that such an agreement is against public policy and void at common law, and therefore the suit can not be maintained.

In the uncertain state of the law in this State upon that question, it will not be here discussed, as perhaps before another trial it may be authoritatively settled by the Supreme Court. The facts were all before the Superior Court by a stipulation between the parties. The parties for whose use the suit is brought claim under an order in these words:

"DIXON, ILL., April 30, 1885.

"To the Chicago & North-Western Railroad Company:

You will please pay to the firm of Underwood & Mathews all claims and moneys due or to become due us, for overcharges or rebates on freight shipped over your railroad, which claims and moneys have been this day assigned to said Underwood & Mathews.

(Signed) BECKER & UNDERWOOD."

And a part of the stipulation is, that Underwood & Mathews were, and still are, creditors of Becker & Underwood, and received said order as security therefor. This order was presented to the railway company before May 11, 1885, and they paid on it to Underwood & Mathews, rebates on wheat shipped during the months of January, February and March, 1885, \$968.91. Afterward the railway company paid a subsequent assignee the money now in controversy, amounting, without interest, to \$1,606.89, for rebates, but of that sum less than \$150, if no error has been made in computation, is upon wheat shipped before the date of the order. The stipulation says that in the early part of the year 1885, the agreement for rebates was made; that the rebates paid by the railway company to the subsequent assignee, accrued to the appellees under that agreement. The agreement was without limit as to time, and by its own force, would continue until one or the other party rescinded it, or the business governed by it, ceased.

The agreements of men in business are not to be held void for mistakes in grammar, but the fair construction of this order is that no such mistake was made. The appellees used the verb "to ship" in a past tense in order to express a past action. *Fisher v. Minot*, 10 Gray (Mass.), 260. Neither the firm giving nor the one taking the order could have supposed that the appellees were hypothecating all their future business with the railway to Underwood & Mathews. The order only covers money due or to become due on wheat that had been shipped when the order was drawn. To construe it as embracing future shipments takes from the appellees as a firm all right to receive any rebates from the appellants, whether accruing under the then existing agreement or otherwise, at least so long as any portion of their debt to Underwood & Mathews remained unpaid. The recovery of \$1,940 is therefore unwarranted by the terms of the order.

But there is another ground upon which the right to recover fails. Payment to the subsequent assignee was a good defense against the appellees themselves. It would be good against the parties for whose use the suit was brought, so far

Blain v. Foster.

and so far only as in equity they were the owners of the claim sued upon.

How much the appellees still owed them at the time of the trial upon the debt that the order was given to secure does not appear. In any event there could not be a larger amount recovered than the appellees still owed upon the debt.

The judgment must be reversed and the cause remanded.

Reversed and remanded.

STEPHEN BLAIN ET AL.

v.

MARY FOSTER.

33	297
54	161
33	297
55	413
33	297
33	385

Chattel Mortgages—Conditions—Sale—Trove—Tender.

1. To maintain trover the plaintiff must at the time of the conversion have, as against the defendant, a right of property in the chattel converted, and the actual possession or right to possession thereof.

2. In equity, where a tender is made by a mortgagor of the amount due after default in the payment, the same must be kept good in order to discharge the mortgage.

3. At law such tender does not operate to revest the title in the mortgagor so as to enable him to recover. The mortgagee is not bound to receive the amount due and restore the property.

4. This court holds as erroneous a judgment in behalf of the plaintiff in an action of trover brought to recover the value of certain property alleged to have been converted by the defendants to their own use upon the ground that the same included the value of property mortgaged, they as mortgagees being rightfully in possession thereof under the terms of the instrument.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. B. M. SHAFFNER and G. W. WOODBURY, for appellants.

Mr. FRED. S. MOFFETT, for appellee.

GARNETT, P. J. Appellee sued appellants in trover to recover the value of certain personal property, which she alleged belonged to her and was converted to their own use by appellants. There is no dispute that in the fall of 1886 she executed to the appellants two chattel mortgages on the property in question (excepting a small part thereof); that about March 1, 1887, the mortgagees, with the consent of the mortgagor, took possession of the same, placing it in a warehouse, where it remained until June 10, 1887, and that they, several months later, sold for less than the amount due and costs, substantially, all the property covered by the mortgages. The sales were made in pursuance of powers given in the mortgages.

To maintain trover the plaintiff at the time of the conversion must have as against the tortfeasor a right of property in the chattel converted, and the actual possession, or right of possession thereof. *Cooley on Torts*, 442-443; *Owens v. Weedman*, 82 Ill. 409.

To meet this established rule appellee endeavored to prove that she made a tender to the appellants of the amount due them. Conceding that the form and amount of the tender were sufficient (which is by no means clear) the fact remains that it was not made until after default in payment. At the time appellee claims to have made the tender all the debt secured by one of the mortgages was due by the terms thereof, and the debt secured by the other was partly due by its terms, and the balance had become due by the exercise of the option given to the mortgagees.

No effort was made to prove that the alleged tender was kept good, nor was the money brought into court. If appellee's contention on this point is correct the result is that appellants have lost their security by means of the discharge of the mortgage, effected by the tender, which is now of no avail to them. The rule in equity governing such cases in this State is, that when the tender is made after default in payment it must be kept good in order to discharge the mortgage. *Crain v. McGoon*, 86 Ill. 431.

At law the rule seems to be more favorable to appellants.

 Lynn v. Lynn.

Jones, in his work on Chattel Mortgages, Sec. 632, says: "At common law a tender made after forfeiture does not operate to revest the title in the mortgagor, so as to enable him to recover at law. The mortgagee is not bound at law to receive the amount due and restore the property. If the mortgagor has any right it is merely an equitable right of redemption." But if we apply the equitable rule as above announced, it is a complete defense for appellants so far as the mortgaged goods are concerned. If the tender was not effectual to release and discharge the mortgage it is obvious that the right of the mortgagees to the possession was not divested. If the mortgagees were entitled to the possession, the mortgagor could have had no right of possession and so could not maintain trover for the goods mortgaged. The amount of the recovery was for a much larger sum than the value of the property not included in the mortgage, which appellee claims was converted by appellants. If the property was converted by them upon which they had no lien, appellee may have a right of action in trover for the value thereof, but the judgment appealed from includes the value of the property mortgaged, and is therefore erroneous.

The judgment is reversed and the cause remanded.

Reversed and remanded.

 NELLIE LYNN ET AL.

v.

ELLEN LYNN, ADM'X ET AL.

Administration—Debts—Sale—Will—Deed—Misdescription—Reformation—Consideration.

1. A deed, the consideration of which was not valuable, can not be reformed, no matter how meritorious the consideration or motive for making it may have been.

2. In the case of powers, equity will not aid an imperfect execution for the benefit of grandchildren.

3. Upon an appeal, in administration proceedings, from a decree of sale

of real estate for the payment of debts, the fact being that the will, under which the same was derived by deceased, was followed by a deed by the maker thereof, attempting to convey the property in question in trust for a person since deceased, and surviving grandchildren, said property having been misdescribed therein, this court holds that said deed can not be reformed, that the will in question vested a good title in the beneficiary named therein, and declines to interfere with such decree.

[Opinion filed June 14, 1889.]

APPEAL from the Probate Court of Cook County; the Hon. J. C. KNICKERBOCKER, Judge, presiding.

MOSSRS. JOHN N. JEMISON, and B. M. SAUNDERS, for appellants.

Mr. B. W. ELLIS, for appellee.

GARY, J. This is an appeal from the decree of the Probate Court directing the sale of real estate to pay the debts against the estate of George Lynn, deceased, of which the appellee is administratrix.

William Lynn Sr., the ancestor of most of the parties to this proceeding, died about November 15, 1874. In his lifetime he owned the premises in controversy. He left a will devising them to George Lynn. That will was wrongfully destroyed after the death of William Lynn Sr., but in a chancery suit in the Circuit Court of Cook County, to which all his heirs as well as his widow were parties, the will was established by a decree entered June 18, 1878. June 5, 1878, by a deed under which the present controversy arises, William Lynn Sr., and his wife, conveyed to one of the appellees what were intended to be these premises, but by mistake inserted ten instead of sixteen as the number of the section, and there is on the face of the deed no other description by which the consequences of that mistake can be avoided. This conveyance was in trust for the support of a daughter, since dead, without issue, and after her death for the benefit of the children of certain children of William Lynn Sr., who should be living when the daughter died.

Bittering v. Druck.

The deed named as the consideration \$3,000, but in fact there was no valuable and no other still continuing consideration, than such as may be implied by law from the relation of grandfather and grandchild. The will was executed before the deed, and the deed was intended to supersede the will as to these premises. The only question before this court is, whether that deed may be reformed upon abundant extrinsic evidence, so that these premises shall pass by it.

The great current of authority is, that a deed, not for a valuable consideration, can not be reformed, however meritorious the consideration or motive for making it may be. *Froman v. Froman*, 13 Ind. 317; *Powell v. Morisey*, 98 N. C. 426; *Hunt v. Frazier*, 6 Jones' Eq. 90; *Brown v. Kennedy*, 33 Beav. 133. Even in the case of powers, which are *quasi* trusts, a court of equity will not aid an imperfect execution for the benefit of grandchildren—only for a wife or legitimate child. *Tollet v. Tollet*, and notes, 1 L. C. in Eq. 365. It follows that the devise to George Lynn vested in him the equitable as well as legal title to these premises, and the Probate Court properly directed them to be sold for the payment of debts against his estate. Had there been any equity in favor of the appellants, for which his title should have been divested, that court had jurisdiction to inquire into it and refuse a sale. Sec. 101, Chap. 3, R. S., as amended by act of June 15, 1887. *Newell v. Montgomery*, 30 Ill. App. 48.

The decree must be affirmed.

Decree affirmed.

A. BITTINGER
v.
CHARLES DRUCK.

Assault—Evidence—Self-defense—Instructions.

1. An instruction assuming to set forth all the facts which warrant a recovery, but omitting one material element in the hypothesis, is bad.

2. When the facts relied on by the plaintiff are necessarily antagonistic to and exclude those relied on by the defendant, the instructions for the plaintiff need only summarize all the elements in the cause essential to a recovery on his theory.

[Opinion filed June 14, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. E. K. SMITH, for appellant.

Messrs. THORNTON & CHANCELLOR, for appellee.

GARNETT, P. J. In an action for personal assault by appellee against appellant there was a verdict for \$500 against the defendant, and judgment thereon in the Superior Court, from which the defendant brings this appeal.

The defense relied upon at the trial was *son assault demesne*. Whether the plaintiff or the defendant was the first aggressor was a question presented to the jury by evidence of a very conflicting character, and the question should have been submitted to the jury by the instructions of the court. But in behalf of the plaintiff the jury was charged, that if they believed from the evidence that the plaintiff was assaulted by defendant as charged in the declaration, and sustained injury thereby, they should find the issues for the plaintiff. It was not disputed that the defendant clinched with the plaintiff. The point of contention was whether defendant in closing with the plaintiff was acting in self-defense against a prior assault of the plaintiff. The evidence may have convinced the jury that Druck was the first offender, but the charges of the court directed them, in substance, that they need pay no attention to that circumstance.

It is a case in which the instruction assumed to array all the facts which warranted a recovery, but omitted one material element in the hypothesis. There was no other instruction given which supplied this omission. Repeated decisions of this court and the Supreme Court of this State

Bournique v. Arnold.

have proscribed instructions of this character. Examples of this are found in *Cushman v. Cogswell*, 86 Ill. 62; *W., St. L. & P. Ry. Co. v. Rector*, 104 Ill. 297, and *Emery v. Ginnan*, 24 Ill. App. 65.

When the facts relied on by the plaintiff are necessarily antagonistic to and exclude those relied on by the defendant, the instructions for the plaintiff need only summarize all the elements in the cause essential to a recovery on his theory. In such a case "any attempt to embody in one instruction all the hypothetical elements contained in the distinct and necessarily opposing views would make the veriest nonsense." *City of Chicago v. Schmidt, Adm'x*, 107 Ill. 186. The defense in the case in hand presents no facts which are necessarily antagonistic to, and exclusive of, the fact of assault by the defendant. That the plaintiff made the first assault is entirely consistent with the facts supposed in the instruction under review, and whether the fact was as alleged by the defendant must be submitted to another jury.

The judgment is reversed and the cause remanded.

Reversed and remanded.

AUGUSTUS E. BOURNIQUE

v.

GEORGE A. ARNOLD ET AL.

Master and Servant—Contract of Service—Balance Due—Recovery of—Conditions—Architect's Certificate—Refusal to Accept—Quantum Meruit Agency—Evidence.

1. In the absence of fraud the certificate of an architect, calling for a payment from an owner to a building contractor, is conclusive between the contractor and the owner.

2. The return by a contractor to an architect of a final certificate amounts to the assertion that payment is recoverable without the same.

3. In such case no recovery can be had under the contract, the architect refusing the request of the contractor to again deliver the certificate in question.

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44	300

[Opinion filed June 14, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. GEORGE W. BRANDT, for appellant.

Messrs. DUNCAN & GILBERT, for appellees.

GARNETT, P. J. In the court below appellant was sued in assumpsit by appellees March 2, 1886. The latter were carpenter contractors, who agreed with appellant to do all the carpenter work for a building that appellant was erecting in 1883. Their contract was in writing, by the terms of which they agreed to furnish the materials and do the work according to the plans and specifications made by Burnham & Root, architects, who, they also agreed, should approve and certify the same by writing or certificate under their hand. Appellant on his part agreed thereby to pay to appellees the contract price (\$11,254.30) upon the presentation of certificates signed by Burnham & Root. As the work progressed certificates for various amounts were signed by the architects, delivered to appellees and paid by appellant. Claiming that they had completed the work as agreed, appellees soon thereafter, and about December 1, 1883, applied to Burnham & Root for a final certificate. There was some dispute or misunderstanding between the contractors and architects, growing out of extra work alleged to have been done, and of other work and materials embraced within the contract, which the architects claimed had been omitted by appellees. At that time, however, the architects handed to appellees a paper, which is said to have been a final certificate, for about \$1,700, or, as one of the witnesses states, the sum of \$1,747. After examining the paper the appellees, being dissatisfied with the amount named therein, handed it back to the architects, since which time no witness claims ever to have seen it, nor was it ever presented to or seen by appellant. Appellees then filed in the Circuit Court a petition for a mechanic's lien for the amount alleged to be due them, which in due course was heard and dismissed without prejudice in January, 1886.

Soon thereafter they applied to Burnham & Root for the certificate, which had been made out and delivered as above stated, but they were told by the architects that they had tendered a certificate once and would not do it again. That was over two years after the certificate was first delivered to, and rejected by, appellees. The proof concerning the contents of the certificate was somewhat vague, but, conceding it was in all respects satisfactory, the inquiry remains, was the presentation of the certificate to appellant a condition precedent to recovery? No evidence was given of the value of the work and materials, appellees relying solely on parol proof of the amount stated in the certificate as conclusive of the amount due them. The contract of appellees required them to do three distinct things before they could call on appellant for money: (1) They were to furnish labor and materials; (2) procure a written certificate from Burnham & Root as to the amount which appellant should pay to them; (3) present the certificate to appellant. Whatever difference in judgment there may be as to the importance to appellant of the third requirement, there can be no division of opinion as to his right to demand that, under the stipulations of the contract, appellees yield to the demand; and as no fraud or unfair practice was resorted to for the purpose of securing their consent, no good reason can be given why they should be relieved of their undertaking. If it were necessary to assign a cause for appellant's desiring a written certificate the task would not be difficult. In general terms it is well known that the human memory is treacherous, while words and figures committed to writing are more enduring, and can not, by anything short of a crime, be made to tell more than one story. Then it must be remembered that one employing an architect, relies not only on his skill but on his responsibility. In the absence of fraud the certificate of the architect is conclusive between the owner and the contractor, but it cuts no figure between the owner and the architect. The responsibility of the latter can not be thus written away by his own hand. The owner is deeply interested in having written evidence over the architect's own signature as to his action in the premises, and

when he makes the presentation of such evidence to himself a condition of payment to the contractor, the latter having agreed to the condition, will not be heard to say that he will not perform that agreement, but that he will do something else which he considers just as well for the owner. It is enough for the owner to say by the contract, it is thus written. As it was written so it must stand and be enforced. *Barney v. Giles*, 120, 154.

The case here presented is not one where the certificate was destroyed by the act of God, the public enemy or inevitable accident. But appellees, assuming to pass upon their legal rights, wilfully and deliberately disqualified themselves for compliance with their contract. Having received the certificate upon which they now rely, after examination of the same, they deliberately returned it to Burnham & Root. In so doing they assumed the burden of proving that a case had arisen which entitled them to payment from appellant without a certificate. We surmise that they endeavored to maintain that position until the mechanic's lien case was dismissed. Having failed to sustain that contention they now strive to restore things as they were when they had the certificate in their possession, not by performing their contract, but by substituting something in the place of performance. But the fact is overlooked that, so far as appellees are concerned, the relations of Burnham & Root to appellant terminated the instant the certificate was delivered to appellees. When they returned the paper to Burnham & Root they took upon themselves all risk of so doing. It was not returned to appellant's agents, for Burnham & Root were no longer his agents in any transactions with appellees. If Burnham & Root after that time were agents of any person for the holding of the certificate, they were the agents of appellees, and by them alone they now find themselves refused possession of the paper. The contract of appellees not having been performed they can not recover thereon. If there can be any recovery on a *quantum meruit* (as to which we express no opinion) no case appears from this record for such recovery, as no proof of the value of the labor and materials was introduced on the trial. The judgment is reversed and the cause remanded.

Reversed and remanded.

CHICAGO & NORTHWESTERN RAILWAY COMPANY

v.

GEORGE TRAYER.

Railroads—Negligence—Personal Injuries—Signals—Ordinance—Evidence.

1. Negligence is a question of fact for the jury.
2. To instruct a jury as to the weight of affirmative and negative testimony is erroneous.
3. A red lantern hung to the corner of an engine tender is no compliance with an ordinance requiring "a brilliant and conspicuous light."
4. In an action for the recovery of damages from a railroad company for personal injuries, alleged to have been suffered through its negligence, this court declines to interfere with the verdict for the plaintiff.

[Opinion filed June 14, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. W. C. GOUDY and W. B. KEEF, for appellant.

Mr. W. S. JOHNSON, for appellee.

GARY, J. From the testimony of the various witnesses in this case it appears, that on the dark and stormy evening of the 25th of November, 1883, while the atmosphere was saturated with rain drops and sleet, "which froze as they fell," and the moon, which lacked but three days of being full, shone bright and clear from unclouded skies through a balmy air several degrees above the freezing point, the appellants backed a locomotive and tender eastward on the north track on Kinzie street, across Robey street, in Chicago, and struck the appellee, who was crossing Kinzie street on Robey from the northwest toward the southeast corner of the intersection of the two streets. He received the blow upon his right shoulder, and without going into detail it suffices to say that

38	385
44	344
44	408
33	307
54	417
54	554
54	642
33	307
57	451
33	307
64	602
33	307
68	637
33	307
108	642

he has substantially lost the use of his right arm. An ordinance of the city put in evidence required the locomotive to carry "a brilliant and conspicuous light on the front end." In fact there was probably a red lantern hung to what was, as then moving, the northeast corner of the tender. At the same time that the locomotive and tender were entering upon the intersection of the streets from the west, a west bound freight train on the next track south, was leaving it.

It may well be, that if the bell was being rung on the locomotive some twenty or more feet from the end of the tender, that the noise of the passing freight train drowned the sound of the bell. This lantern and bell were the only warning, beyond the presence of the locomotive and tender themselves, of their approach. Whether the question be one of fact or law, it can hardly be said—the character of locomotive and headlights being taken into account—that a red lantern hung to the corner of the tender, complies with the ordinance; in a dark night an observer might readily suppose that a man was carrying it; and a practice of backing a locomotive and tender across streets of a populous city, in the early hours of dark nights at the same time that heavy freight trains—what in this record is called a double freight train—are crossing in the contrary direction, with no greater precaution than this record shows, it may be safely predicted, will sooner or later injure somebody.

These considerations were for the jury. The emphasis with which the counsel for the appellants pronounces a recent decision of this court that "the question as to what constitutes negligence is one of fact and not of law," * * * "a heresy * * * not supported by either principle or authority," comes with a strange sound from one who has been "a brilliant and conspicuous light" in his profession, through all the hundred and odd volumes in which the Supreme Court have reiterated the doctrine, from the case of the G. & C. U. R. R. Co. v. Yarwood, 17 Ill. 509, where they said, "Negligence is a question of fact and not of law, and the court had no right to determine it," down to L. S. & M. S. R. R. Co. v. Brown, 123 Ill. 162, where they repeat that negli-

gence is "a question of fact to be determined by the jury, upon consideration of all the facts and circumstances proved." Nor have they stopped at that. In *Fairbury v. Rogers*, 98 Ill. 554, in a connection too long to quote, they said: "The Circuit Court, in charging a jury, is confined to questions of law. It is not proper that expressions of opinion by this court that certain circumstances show or constitute a culpable want of care, should be given to the jury in an instruction. However sound such opinions may be, they relate alone to a question of fact, which, in the first place, by our law, must be submitted to the unbiased opinion of the jury." And for repeating to the jury, as an instruction, the opinion of the Supreme Court in relation to facts in the same case, when it was before them upon appeal from a former judgment, these appellants, by other counsel, procured the reversal of the second judgment in *C. & N. W. Ry. Co. v. Moranda*, 108 Ill. 576. The jury were instructed far more favorably to the appellants than the law of this State warrants. The refusal to instruct the jury as to the weight of affirmative and negative testimony, was not error; giving such instruction would be. *Rockwood v. Poundstone*, 38 Ill. 199; *L. N. A. & C. Ry. Co. v. Shires*, 108 Ill. 617. In a case recognizing the rule that affirmative is more to be regarded than negative testimony, it is still held that "it is the sole province of the jury to determine the weight that evidence should receive, and equally so to consider conflicting evidence, without any assistance from the court." *Frizell v. Cole*, 42 Ill. 362. Similar expressions can be found in many volumes of the Illinois Reports, 32-388, 41-254, 77-379.

The only real question in the case is whether the jury ought to have found the verdict that they did. The evidence on the part of the appellee warrants it. The only substantial conflict in the evidence was as to the character of the night. Upon the jury the Legislature of this State has placed the burden and responsibility of deciding between conflicting witnesses "without any assistance from the court." For a court to interfere with their decision upon mere dissatisfaction—the opinion of one man against twelve—upon a matter upon

which each of the thirteen is equally competent to judge, is usurpation. It does not become this place to inquire whether there is any justification or excuse for the very general generosity of jurors, at the expense of the proprietors of the ponderous and dangerous agencies of modern civilization.

There is no error in the record, and the judgment must be affirmed.

Judgment affirmed.

MALCOM MCNEILL

V.

MAURICE LACEY AND GEORGE A. MOORE.

SAME

V.

MAURICE WENDELL.

Attachments—Garnishment—Assignment—Insolvent Corporations—Officers of—Personal Claims—Payment.

1. This court can not consider alleged errors against persons not parties to a given appeal.
2. The officers of an insolvent corporation must not use up its assets in the payment of their own claims.

[Opinion filed June 14, 1890.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. CHARLES H. ALDRICH, for appellant.

Messrs. WILLIAM NUNN, and FLOWER, REMY & HOLSTEIN, for appellees.

GARY, J. These two cases involve the same question, and the first has in it also the question of fact, whether the appel-

lees were creditors at the time of the transaction which is the subject-matter of litigation, of the affirmative of which the record in that case contains satisfactory evidence which it would be useless to repeat.

The cases are attachments by the appellees, respectively, against the World's Pastime Exposition Company, in which the Illinois Central Railroad Company was summoned as garnishee. The railroad company paid the money now in controversy into court. The appellant claimed it by assignment from the exposition company, and the appellees by their garnishment. The appellant's brief argues the insufficiency of the evidence to support the verdict against the exposition company on the issue made by the affidavit for an attachment, but that question is not before the court, as the company has not appealed. Whether there be any error against the company, can not be determined on an appeal to which the company is no party. Several questions of practice, of no importance, are made, which need no attention.

The real controversy is upon the fact that the company, being insolvent, and the appellant being its president and a large creditor, and the railroad company owing it about \$4,800, it transferred the claim to the appellant, presumably, though the record does not show it, to apply on account of the debt to the appellant, no other consideration being shown.

The case of *Beach v. Miller*, 130 Ill. 102, is emphatic that the officers of an insolvent corporation may not use up its assets in payment of their own claims. That an attempt to do so is void as against the process of an outside creditor.

So much of the money in court as is necessary to pay these appellees was, therefore, rightly adjudged to them.

Judgment affirmed.

ANDREW PORTOUES

v.

HENRY HOLMES ET AL.

Mechanics' Liens—Intervening Petitions—Parties—Pleading—Chap. 82, R. S., Secs. 1, 2, 3 and 5—Master—Finding of—Exceptions.

1. Alleged errors that do not affect the party complaining should not be considered.

2. The first and second sections of the Lien law, Chap. 82, R. S., give a lien in all cases for work or material furnished at the instance of the owner of any interest in land for anything which, by being furnished for that purpose and attached to the premises, becomes the property of such owner as part of his interest in the land.

3. Petitions for mechanics' liens must truly describe the contract entered into, what was done under it, and if no time was fixed by it for performance the law will imply it to be a reasonable time, and in the latter case if performance is complete within a year, the lien attaches.

4. It is not necessary by express words to negative Sec. 3 of the Lien law, which sets forth the exceptional cases in which no lien can exist, but only by affirmative description of the contract so far as it was express, and of the acts done in the performance of it, show what the whole case is, and if so shown nothing repugnant to the provisions of such section appear, a lien exists.

5. A decree adopting a master's report amounts to the overruling of exceptions thereto.

6. Upon a petition filed for a mechanics' lien this court holds that the complaint of the defendant that the *cestui que trust* under a trust deed was not made a party defendant should not be considered, upon the ground that the error, if any, does not affect him; that the contention that certain intervening petitions do not specify when work was to be done and material furnished is not supported by the evidence; that the fact that the decree of sale is several as to the petitioners in the several petitions, cures the omission of one of two pieces of land from the original petition, but included in the intervening petitions, in so far as to warrant the participation of the original petitioners in the proceeds of the sale decreed in behalf of the intervening petitioners, and that the defendant's exceptions, save one, to the master's report, can not be considered for want of certainty.

[Opinion filed June 14, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. HENRY M. SHEPARD, Judge, presiding.

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43 464
44 306
33 312
55 220
33 312
64 186
132 377

Portoues v. Holmes.

Messrs. WILSON & ZOOK, for appellant.

Messrs. THORNTON & CHANCELLOR, for appellees.

GARY, J. This is a mechanics' lien case in which the appellee Holmes and his partner, Elliott W. Sproal, filed the original petition against the appellant and Albert White, as owners. The other appellees filed intervening petitions.

The appellant objects that though the holder of a deed of trust in the nature of a mortgage is made a defendant, the *cestui que trust* is not. It is a sufficient answer that if there were any error in that respect, it does not affect the appellant, and he can not complain of it. The same rule applies whether the case be at law or in equity. *Grier v. Puterbaugh*, 108 Ill. 602; *Worden v. Crist*, 106, 326. And such *cestui que trust* is not injured, for the decree is that the sale of the premises is to be subject to the incumbrance, and besides, none but parties are affected by the decree. *Dunphy v. Riddle*, 86 Ill. 22.

It is also objected that the intervening petitions, one on behalf of a plumber, and the other for lumber furnished, do not specify when the work in the one case and the lumber in the other was to be done or furnished. Those petitions do show that the work was done and the lumber furnished by May 31, 1884, for houses being erected in 1884, and that payment was to be made within four months after the last work done or lumber furnished. In general terms it may be said that the first and second sections of the statute of March 25, 1874, Chap. 82, R. S., in relation to liens, give a lien in all cases for work or material furnished at the instance of the owner of any interest in land, for anything, which, by being furnished for that purpose and attached to the premises, becomes the property of such owner as part of his interest in the land. The third section specifies the exceptional cases in which no lien shall exist.

The fifth section is: "The bill or petition shall contain a brief statement of the contract on which it is founded, if expressed, or if the work is done or materials are furnished under an implied contract, the bill or petition shall so state

and shall show the amount due and unpaid, a description of the premises which are subject to the lien, and such other facts as may be necessary to a full understanding of the rights of the parties." Now the rule of pleading, at law, has been settled for generations, that in pleading, whether upon contracts or statutes, if there be first "a general clause, and afterward a separate and distinct clause, something which would otherwise be included in it, a party relying upon the general clause, in pleading may set out that clause only, without noticing the separate and distinct clause which operates as an exception." Such an exception is matter of defense, and ought to be shown in pleading by the opposite party. 1 Ch. Pl. 246-7, 16th Am. Ed.

And it is only untechnical, and a matter of form, to omit what the law implies from the facts that are alleged. Ibid. 309; Kinsley v. Bill, 9 Mass. 197. And "although the rules of pleading in courts of equity, especially in the case of bills, are not so strict as those adopted in courts of law, yet in framing pleadings in courts of equity the draftsman will do well (says 1 Daniell's Ch. 362) to adhere as closely as he can to the general rules laid down in the books which treat of common law pleadings, whenever such rules are applicable to the case which he is called upon to present to the court," and he follows with good reasons for his advice. It must be confessed that from the numerous decisions of the Supreme Court on the subject of mechanics' liens, an anxious reader is left in painful uncertainty as to what rules apply to petitions for their enforcement; but the conclusion at which this court has arrived is that the petitioner must truly describe the contract he actually had, and what he did under it, and then, if no time was fixed by it for performance, the law will imply that it was to be in a reasonable time. That portion of the contract is then an implied contract, and if performance was complete within a year from the commencement, the lien attaches. It is therefore not necessary, by express words, to negative the language of the third section, but only by affirmative description of the contract so far as it was express, and of the acts done in the performance of it, show what the whole

case really is; and if, so shown, nothing repugnant to the provisions of the third section appear, a lien exists.

The decree is for the sale of premises described as the north forty-nine feet of one lot and the south nineteen feet of another. The original petition only describes the forty-nine feet. The intervening petitions describe both parcels. If the decree must stand or fall upon the original petition, it must be reversed. But the decree is several as to the petitioners in each petition. If the decree is right as to the intervenors, so much of it would stand, and the sale take place, though the part relating to Holmes and Sproal were reversed. *Rees v. Chicago*, 38 Ill. 322, and cases there cited. This defect in their petition was not adverted to in the Superior Court, and is plainly a mere slip. As under the decree for the intervenors the premises are to be sold, no wrong is done by permitting the original petitioners to share in the proceeds. If, indeed, the appellant shall pay off the intervenors, without a sale, it probably will follow that a sale of nineteen feet under the decree in favor of the original petitioners will pass no title to the nineteen feet, being beyond the jurisdiction of the court on that petition. In that contingency, by some appropriate proceeding, as by a bill of review, the decree may be made to conform to the petition. It is not a practical matter affecting the real rights of the parties or the justice of the case.

The appellant says truly in his brief, that the case was such as requires a reference to a master. That subject has been considered in *Huling v. Farwell* this term. In fact there was a reference "to take proofs and report the same," and it is objected that he had no authority to report conclusions. The appellant treated the case in the Superior Court as properly referred to the master with full powers to him. Before the master, the appellant filed objections to the master's conclusions and repeated them as exceptions to the report before the court. In all this he followed the regular order of chancery practice. But in his objections and exceptions, the same want of certainty appears in this case, as in that last cited. It can not be ascertained whether any one of them is well taken without a full examination of all the evidence in the

case. One already familiar with the case would know what part of the evidence to look to for information as to either claim, or any question involved, but to a court taking up the record as a new matter, the exceptions only show that the appellant is dissatisfied with the report, in general and detail.

The only exception that can be considered without examination of the whole evidence, is, that the master has reported a prior incumbrance, but has not reported the separate value of the land and improvements. If the premises were to be sold discharged of that incumbrance, that exception would be well taken under Sec. 17 of the Lien act, but as they are to be sold subject to it, the separate value is immaterial.

The record does not support the assertion in the brief that it does not appear that the master's report was before the court. The report is copied into the record as filed June 3, 1885, and the decree recites that the cause came on to be heard upon certain bills and answers "together with the report," etc.

There is no formal order upon the exceptions to the report, but a decree adopting its conclusions in effect overrules the exceptions. *Anderson v. Henderson*, 124 Ill. 164. The rule at law is the same as to the motion for a new trial. *Parr v. Van Horne*, 40 Ill. 122. Aside from the conduct of the appellant in treating the proceedings before the master as on a full reference, his objections to the master's authority are answered by the case of *Hess v. Voss*, 52 Ill. 472. Before making the point that the sale will be without redemption the writer of appellant's brief should have read Sec. 16, Ch. 77, R. S., and several sections following.

What may be the real merits of the several claims upon the facts, is a subject upon which this court can make no inquiry without departing from the regular course of chancery practice, and making a precedent, to follow which would impose upon this court labors not belonging to it, and which, with the press of business, it has no time to perform. The decree is affirmed.

Decree affirmed.

Gaffield v. Scott.

ELI GAFFIELD
v.
ROBERT SCOTT ET AL.

Sales—Goods for Family Consumption—Husband and Wife—Purchases by Wife—Promise to Pay by Husband—Evidence—Burden of Proof—Instructions.

1. This court can not pass upon an alleged erroneous ruling touching the introduction of certain evidence, in the absence of information as to what the answer to the question asked, and to which an objection was sustained, would have been.

2. In an action for the recovery of a sum claimed to be due for goods furnished for family consumption, this court holds that the trial court erred in refusing to give in behalf of the defendant certain instructions, touching the necessity for a consideration to support a promise to pay, and the liability of a husband for debts contracted by his wife.

[Opinion filed June 4, 1889.]

APPEAL from the Circuit Court of Cook County; the
Hon. A. N. WATERMAN, Judge, presiding.

Mr. HENRY HIESTAND, for appellant.

Mr. H. C. BENNETT, for appellees.

MORAN, J. This action was commenced against appellant and his wife, and the special counts in the declaration were for goods, wares and merchandise sold and delivered to defendants, "the same being for the expenses of the family of said defendant, and delivered to and so used by said defendants," and there were also the common counts. Upon the trial the action was dismissed as to the wife, and proceeded to verdict and judgment against appellant. The proof was that the goods were purchased by the wife, but there was no proof as to the delivery of the goods to any person or at any place. There was some evidence weakly tending to show that appel-

33	317
41	349
33	317
51	270
51	294
51	375
51	481
33	317
57	417
57	434
33	317
62	497
33	317
64	164
33	317
68	441
33	317
70	171
70	660
33	317
72	105
73	256
75	59
33	317
80	513
33	317
102	1571
33	317
108	1584

lant, when the bill was presented to him, promised to pay it, but on this point there was a decided conflict.

A witness named Graham, a son-in-law of Mrs. Gaffield, called by appellant, was asked by appellant's counsel the following questions:

Q. "Have you examined the account in the declaration for the purpose of ascertaining when certain articles were delivered, that are marked there as delivered at a certain number on Indiana street?"

A. "Yes, sir.

Q. "Who resided there?"

A. "Franklin Graham and Angela W. Graham.

Q. "Were those goods delivered and for whose use were they delivered and by whom were they used?"

(Objection sustained and exception by defendant.)

Q. "Now, Mr. Graham, do you know to whom the goods mentioned in the bill of particulars filed in this case, were delivered by this plaintiff's firm?"

A. "Yes, sir.

Q. "To whom were they delivered?"

(Plaintiff's objection sustained and defendant excepted.)

The ruling in refusing to allow the witness to answer said questions is assigned for error. There was no offer made by counsel, and no statement to the court of what he expected the witness would answer to such questions. It is not apparent from the questions what the evidence sought to be elicited would be, though it may be inferred that it was expected the answer would be favorable to defendant. But that is not enough. To overcome the presumption that the ruling of the trial court is right, it must be made to appear affirmatively from the bill of exceptions that prejudicial error was committed. We must know what appellant claims the answer would be, before we can determine that it was error to exclude them. *Jenks v. Knatts Mexican S. W. Co.*, 58 Ia. 549; *Vatow v. Diehl*, 62 Ia. 676; *Mergenthem v. The State*, 107 Ind. 567; *Stanley v. Smith*, 15 Oregon, 505.

Defendant asked the court to give the following instructions, but the court refused.

Trumbull v. Union Trust Co.

1. The jury are instructed as a matter of law that a promise made without consideration is of no legal effect, and is not binding upon the person so making it, and in this case, even should it appear by a preponderance of the evidence that the defendant, Eli Gaffield, did promise to pay the claim in question, such promise is not binding upon said defendant, unless it also appears that there was a good and valuable consideration for such promise.

2. The jury are instructed that a husband can not be made liable for debts contracted by his wife in his name unless she has authority to make such contract, and a tradesman who sells goods to the wife upon credit of her husband takes the burden of proof of showing such authority, and in this case, unless such authority has been shown by the preponderance of the evidence, the verdict should be for the defendants.

The refusal to give such instructions was error. They contain correct propositions of law applicable to the evidence in the case. Eddy v. Roberts, 17 Ill. 505; Schouler on Husband and Wife, Sec. 127 *et seq.*

For the error in refusing said instructions the judgment must be reversed and the case remanded.

Reversed and remanded.

LYMAN TRUMBULL ET AL

v.

UNION TRUST COMPANY ET AL.

33	319
137	146
33	319
168	539
33	319
99	2 45
99	2 46

Insolvency—Wool Factors—Assignment by Less than Full Number of Members of Firm—Subsequent Ratification by the Rest—Receiver—Possession of—Warehousemen—Loans upon Receipts of—Attorney's Fees—Evidence—Costs—Confusion.

1. An assignment should not be made by less than the full number of the members of a given firm in the absence of the rest and without their authority, unless a crisis has arrived in its affairs, and the absent partners can not be consulted personally or otherwise, in time to meet or avoid the same.

2. Subsequent ratification by such absent partners does not operate to divest the rights of purchasers and lien holders acquired in good faith after the execution of the first instrument, and before such ratification.

3. The admixture by a factor of certain grades of wool belonging to different consignors, without keeping account of the property of the different shippers, amounts to confusion, and in proceedings involving the same, the owners must be made whole beyond all doubt.

4. The practice of factors to issue what purport to be warehouse receipts covering their own property upon their own premises, does not constitute them warehousemen, nor does such receipt furnish greater protection to its holder than would an unacknowledged chattel mortgage.

5. Upon an appeal from an order of the County Court touching the matter of the insolvency of a firm of wool factors this court holds, with reference to the claim for first lien by the Union Trust Company, upon certain wool, that the same can not be maintained in view of the fact that the amount of money claimed to have been advanced by it thereon and unpaid at the time of the hearing in said court is purely conjectural and incapable of being shown; that the assignment by two of three partners composing the insolvent firm was inoperative to pass title to the property involved until the same was ratified by the absent partner, his whereabouts not having been shown when the same was made, and that the interest of the two partners did not pass till then; that the taking possession by a storage company of lofts leased by it from said insolvents by a ruse after the receiver of said firm had taken possession thereof, and before such ratification, can not be complained of; that such action sufficed to make its title complete against the assignors, assignee and general creditors to the extent of the advances of its receipt holders which remained unpaid, and that certain receipt holders had no better standing as against the consignors of certain wool than the factors would have themselves.

[Opinion filed June 4, 1889.]

APPEAL from the County Court of Cook County; the Hon. R. PRENDERGAST, Judge, presiding.

This is an appeal from an order of the County Court of Cook County in the matter of T. W. Hall & Co., insolvent debtors. The firm of T. W. Hall & Co., composed of Thomas W., Charles and William P. Hall, were merchants and factors in wool, having their office and warehouse in two connected buildings, known as numbers 46 to 52 Dearborn avenue, Chicago. They occasionally purchased wool on their own account, but generally their business was that of factors. The firm was a customer of, and kept a general deposit account with the Union Trust Company, a banking institution in Chicago. In June, 1877, an agreement was made between the firm and said bank for advances by the latter on wool to be consigned

to the firm. S. W. Rawson, president of and a witness for the bank, testified that the bank was to have a lease of the second floor of the Halls' warehouse, and that it would pay the drafts against the wool, which was to be placed on said second floor. The trust company was to be considered the owner of the wool to the extent of the advances, and when it was sold, the indebtedness was to be paid; but it never had possession of any part of Hall & Co.'s warehouse, or any part of the wool. When a draft arrived, Hall & Co. would draw their check for the amount, procure a certification thereof by the trust company, and use the same to pay the draft, which was then taken, with the bill of lading for the wool attached thereto, and both delivered to the trust company. Policies of insurance on this wool were taken by Hall & Co. in their firm name, loss, if any, made payable to the trust company, and the policies delivered to the latter. The drafts, bills of lading and policies remained in possession of the trust company until the hearing in the County Court. For the amount of such advances Hall & Co. gave their notes to the trust company from time to time, as the advances were made, the amounts of the notes always being for a somewhat larger amount than the draft. No advances were made by the trust company under this agreement after August, 1887. A separate account of the advances was not kept, but they were blended with the general account of Hall & Co.; the payments made by Hall & Co. were made on the general account, and in renewing the loans the notes for the advances on the wool were kept separate from those given on the general account. The total amount of advances made on wool in 1887 was sworn by Rawson to be \$28,000 on wool consigned by Ayers & Fell, and about \$60,000 on other wool, called Montana. He also testified that out of the total amount of advances, Hall & Co. owed the trust company at the time of the hearing, \$22,665, of which the sum of \$3,165 was for an overdraft. At times, on renewal of a note, the trust company loaned to Hall & Co. more money than the amount of the note taken up. In 1887, the bank advanced to Hall & Co. \$80,000, in addition to the advances on the wool.

The trust company claims a first lien on all the Ayers & Fell wool which came to the hands of the assignee of T. W. Hall & Co., or its proceeds, to the extent of said advances thereon, which (it is alleged) remain unpaid to the amount of \$19,500.

In June, 1887, Hall & Co., by two written instruments, leased to the National Storage Company the third floor of their warehouse for one year, the entire rent being \$5. The conditions of the lease were as follows :

First. That said leased premises shall be used and occupied exclusively for the storage of goods, chattels and personal property.

Second. Said party of the second part, or its agent or agents, shall be permitted easy and convenient passage, at any and all times, through any part of the abutting premises that is or shall be occupied or controlled by said parties of the first part, for the purpose of convenient access to the premises herein leased.

Third. It is further agreed that this lease may be canceled, and the said premises leased herein be surrendered to said first party, whenever all the storage warrants given by said second party to the said first parties shall have been taken up and canceled by said second party.

In January, 1888, they made another lease to the storage company, of the second floor of the warehouse, at the same rental, the above conditions being inserted in the instrument, and another to the effect that Hall & Co. might have the use of such portion of the premises as should not be occupied by the lessees.

In June, 1888, two other leases were executed by Hall & Co. to the storage company for the second and third floors of the warehouse, for a term of one year, the rental specified in each being \$5. The National Storage Company had no permanent warehouse. Its method of business was to take a lease of premises near the persons desiring to have business relations with it, usually leasing a part of said person's premises. Such leased premises are designed to be during the term of such lease, the warehouse of such company. Pos-

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session of them, as it claims, is taken either by placing such premises under its lock and key, or by placing thereon signs indicating its rights and possession. The company's warehouse receipts are then issued upon the property placed upon such premises, and its possession thereof and supervision of the goods placed therein, are alleged to be maintained by the constant presence of a custodian, or by the daily visits of one of its inspectors.

Its warehouses were designated by numbers, that at 46 to 53 Dearborn avenue being numbered 18. After the relation of lessor and lessee was thus created, Hall & Co. made written applications to the storage company in which was stated that the appellants had placed upon premises leased to the storage company a certain amount of wool belonging to the applicants, and requesting a warehouse receipt therefor. In response to such application, receipts were issued by the storage company, acknowledging the receipt of the wool and undertaking to deliver the same to the order of T. W. Hall & Co. at its warehouse No. 18, at the premises described in the leases, upon the payment of storage and charges, and the surrender of the receipts properly indorsed.

Hall & Co. borrowed of the several parties named below, the amounts, and at the dates set opposite their respective names: Lyman Trumbull, \$10,000, December 30, 1887; Commercial National Bank, \$17,500, April 21 and 25, 1888; Ira Tomblin, \$10,000, April 14, 1888; Illinois Trust & Savings Bank, \$27,000 in the fall of 1887; Union National Bank, \$19,000, May 17, 1888; Metropolitan National Bank, \$3,000, June 13, 1888.

To secure these loans warehouse receipts, in substance as above set forth, properly indorsed, were delivered to the several lenders by Hall & Co. On June 1, 1888, all the outstanding receipts were called in by the storage company and others for like amounts issued. At the time of the hearing in the County Court there was due on the several debts last above specified, more than \$50,000, in the aggregate, for which the only security was the said warehouse receipts held by the creditors, which called for more wool than was in the warehouse at the time of the assignment.

In July, August, September, 1887, and May, 1888, William Parberry, Henry Kertz, Grande Brothers, Patterson Brothers and Lieneman & Schmidt, severally shipped to Hall & Co. as factors, certain quantities of wool, parts of which were not accounted for by Hall & Co. up to the time of their assignment. That belonging to Parberry and Kertz was mixed with other wool of the same kind, and they claimed that they were entitled to receive the quantities which had not been accounted for out of any wool of that kind which came into the hands of the assignee. That belonging to Grande Brothers was sent out of their warehouse by the Halls and stored elsewhere, and its identity was lost. Other wool was substituted by the party controlling the latter warehouse, and was received by Hall & Co. as and for the Grande Brothers' wool. The wool of Patterson Brothers and Lieneman & Schmidt which was not sold by Hall & Co., was received by the assignee. Part of the wool which was in Hall & Co.'s warehouse at the time of the assignment was claimed by the Lincoln National Bank, and part thereof by Henry F. Vehmeyer, on receipts issued by T. W. Hall & Co., as collateral security, each receipt acknowledging that a certain quantity of wool had been received, subject to the order of the party to whom the receipt was issued, on the surrender of the receipt. In these receipts, signed by T. W. Hall & Co., it was stated that the property was storage and insurance free.

In the summer of 1888, Thomas W. Hall left Chicago and went west to some point not named by any witness, on business of his firm. Afterward, on July 19th, his partners executed and delivered to John Kinsey, as assignee, an instrument purporting to be a voluntary assignment of the firm of T. W. Hall & Co. Kinsey at once took exclusive possession of the entire warehouse above described, including the second and third floors and all their contents. On the next day, by a ruse, the storage company managed to place one of its agents in actual possession of the second and third floors, and the wool there stored. A dispute as to the possession of those two floors and their contents thereupon arose between the assignee and the storage company, which, by arrangement between

them, resulted in an order by the County Court on July 23d, directing assignee to hold possession until the rights of all parties could be determined, and without prejudice to either, and ordering the storage company to yield possession to the assignee.

On July 21st, Thomas W. Hall ratified and confirmed the assignment to Kinsey. The assignee, by direction of the County Court, sold all the wool which came to his hands, the proceeds thereof being \$51,739.93.

By consent of parties, the claims were all submitted to the court for trial together. Out of the amount so received by the assignee as the proceeds of said wool, the County Court ordered that he appropriate \$5,353.37 in payment of his charges, expenses and attorney's fees included in the litigation and in the administration of his trust. The remainder was ordered to be divided and paid as follows: to the Union Trust Co., \$9,523.22; Patterson Bros., \$5,012.35; Lieneman & Schmidt, \$6,092.11; Grande Brothers, \$2,011.64; William Parberry, \$2,268.32; Henry Kertz, \$857.01; National Storage Company for the benefit of its receipt holders, \$20,561.01. The Lincoln National Bank and Vehmeyer were denied all right as secured creditors.

From that order Lyman Trumbull, Commercial National Bank, Ira Tomblin, Illinois Trust and Savings Bank, Union National Bank, Metropolitan National Bank and National Storage Company appeal. Appellees have assigned cross-error denying appellant's right to participate in the proceeds of the sale of the wool.

Mr. HENRY S. ROBBINS and CHARLES L. BROOKE, for appellants.

The facts found by the final order as the basis of the allowance of the claim of the Union Trust Company are that by contract with T. W. Hall & Co. the trust company was to furnish the money needed to pay advances to be made by T. W. Hall & Co., to persons consigning wool to them on the wool so consigned, and was to have a lien on the wool on which such advances were made for the money so advanced by it; that said wool should be held by T. W. Hall & Co. for the

benefit of said trust company as security for the money so advanced by it, and the proceeds thereof applied to such advances; that under this arrangement the trust company furnished \$18,507.04 to T. W. Hall & Co., who advanced the same to Ayers & Fell upon a large amount of wool consigned by them T. W. Hall & Co.; that all the Ayers & Fell wool which came to the hands of the assignee was received under the agreement and is subject to this lien, and, as it consisted of only 68,530 lbs., the proceeds of which were only \$9,523.22, this sum was awarded to the trust company.

The correctness of this part of the order is contested on two grounds:

1. That under the law and evidence no such lien is established.

2. If established, that it must be postponed to the rights of appellants.

There are three ways of making personal property security for a debt: by a pledge, by a mortgage and by an equitable lien. A pledge this was not, because possession (which is essential) did not pass. It also lacks all the elements of a mortgage. If anything, it is an equitable lien. We are not disposed to deny that the facts found in the decree would establish such a lien, but insist that these facts are not supported by the evidence when considered in connection with the law governing such liens. To such a lien there must be in existence, not only when it is created, but when also it is sought to be enforced, a *res* susceptible of clear identification to which it can attach.

In Jones on Liens, Sec. 34, the author says: "It is essential to an equitable lien that the property to be charged should be capable of identification, so that the claimant of the lien may say, with a reasonable degree of certainty, what property it is that is subject to his lien." * * * "It is necessary that the property or funds upon which the lien is claimed should be distinctly traced, so that the very thing which is subject to the special charge may be proceeded against in an equitable action, and sold under a decree, to satisfy the charge. A fund is not thus traced when it has

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gone into the general bank account of the recipient, or after it has been mixed with other funds from other sources."

Person v. Obertuffer, 59 *Howard's Practice*, 339, is a case exactly in point. The insolvents were silk manufacturers. Plaintiffs had with them an agreement whereby plaintiffs were to furnish raw material, the goods when manufactured to be delivered to plaintiffs, and by them sold, and their advances paid out of the proceeds. Insolvents made a general assignment under which the assignee, among other property, obtained nineteen pieces of silk, both finished and unfinished. This suit was by plaintiffs to enforce an equitable lien upon such silk.

There was, as in the case at bar, "a running agreement between the parties thereto involving settlement of demands, supplies, sales and settlements of advances and material." The court said: "All the cases point to one conclusion: that the identical property or its proceeds must be traced in order to uphold the lien. In this particular the evidence offered on the part of plaintiffs fails to substantiate their claim to the equitable relief which they seek."

The case of *Drake v. Taylor*, 6 *Blatchford*, 14, was a bill to enforce an equitable lien against the proceeds of some property. The court denied the relief, saying: "The money having been mixed and confounded with other money, and neither it nor any substitution for it being shown to be capable of ascertainment or identification, or to be in existence anywhere, the right of the plaintiff to follow the money, and to claim a lien upon anything in respect to it, is gone." See, also, *Fletcher v. Morey*, 2 *Story*, 555; *Grinnell v. Syndam*, 3 *Sandf. (N. Y.)* 134.

It is equally essential to the enforcement of such a lien that, at the time it is sought to be enforced, the debt it secures should be susceptible of ascertainment as to the amount, and should not be so included in other indebtedness as to render it impossible to tell how much is secured by the lien and how much is not. In both these necessary conditions the trust company failed to support its claim by the evidence, the burden of proof, of course, being upon it.

Assuming the lien to have been established, it is, in its character, inferior to the rights of the appellants. As already stated, it is but an equitable lien, a mere equitable right or equity, which can be enforced only by a suit in equity or proceeding that partakes of that character. The trust company's answer or cross-petition was, in effect, a bill in equity to enforce this lien. It sought to establish no right recognized by the law, and could not have been asserted by any legal action. Because the parties intended that particular property should be set aside for, and applied to, the payment of the money advanced by the trust company, equity gives effect to that intention by declaring that the trust company shall have a right in or to the particular property, and sustains a proceeding to appropriate it to the payment of that debt. This is an equitable lien. T. W. Hall & Co., by delivering the warehouse receipts of the storage company to the appellants, also agreed that this same property should be specially applied to the payment of the money which the appellants, upon the faith of that promise, advanced to the Halls. Here, then, if nothing more was shown, is an equitable lien, established with equal clearness, in favor of these appellants. So, too, T. W. Hall & Co., by taking from the storage company its receipts upon this property, and negotiating them with the appellants, with equal clearness agreed that this property might be held by the storage company to protect it against the liability which they imposed upon it by negotiating these receipts. Here, too, is an equitable lien, if nothing more is established. Which, then, of these equitable liens is entitled to priority? If nothing else exists affecting it, we concede that the lien of the trust company, being prior in point of time, will prevail over the others. Upon two equitable principles this order is disturbed, and priority is given to appellants.

1. "Between a legal and equitable title to the same subject-matter, the legal title in general prevails in pursuance of the maxim, 'where there is an equal equity, the law must prevail.'" 2 Pomeroy's Equity Jurisprudence, Sec. 862.

While the right of the trust company is but an equitable one, the right of the appellants is more than this. It is one

that can be enforced in a court of law, through an action of replevin. In other words, it is a legal right, and will prevail when in conflict with this mere equitable one. Much of this bulky record is due to evidence taken to establish or disprove that the possession of the storage company during the term of this lease was sufficiently evidenced and maintained by its conduct, and the signs it placed there to be effectual as against third parties, such as purchasers and judgment creditors. While not satisfied with the result of the lower court's conclusions from this evidence we do not deem it essential in the present state of this record to ask the reconsideration by this court of this part of the case. That court correctly held that the assignee stood in the shoes of, and occupied no better position than the insolvents—a principle so well established in this State, that we presume it will not be questioned here. This involved the further principle that an estoppel good against the insolvents, will prevail against their assignee. As said in *Kelley v. Scott*, 49 N. Y. 602.

"Shawhan (insolvent) being estopped from denying the rights of attaching creditors, his assignees are also estopped. They have no other or superior rights to him, and they are vested with the property subject to all equities against it in his hands."

In *I. R. R. I. & St. L. R. R. v. McCay*, 3 B. R. 50 (1 Lowell, 345), the same principle is announced as against an assignee in bankruptcy. Also, *Allen v. Whitmore*, 14 B. R. 189; *Sharp v. Philadelphia Warehouse Co.*, 14 Phil. 419.

T. W. Hall & Co., by presenting and indorsing to the several appellants (other than the storage company) warehouse receipts which recited that the property had been received by the storage company, and would be delivered by it to the order of insolvents, in effect stated to the several appellants that the wool was in the possession of the storage company, and not in their own possession. These appellants, not knowing the contrary to be the fact, but relying upon this statement, loaned their money to the insolvents, and they would not now be permitted to assert that the possession of the wool was not, at the time of the assignment, in the storage company. Their

assignee is bound by the same estoppel. The same would be true even as respects the storage company.

"Agreement upon a fact as the basis of a contract between parties is binding upon them after the contract has been executed, estopping each party from taking any position to the detriment of the other, inconsistent with the fact." Bigelow on Estoppel, 4th Ed., 655; Heger v. Chicago R. R. Co., 68 Wis. 100; McCance v. L. & N. W. R. R., 3 H. & C. 344.

"Though a contract be in fact held invalid, still * * * if it be acted upon afterward by the parties to it as valid, they will, if *sui juris*, be estopped from asserting its invalidity." Bigelow on Estoppel, p. 657; Branch v. Jessop, 106 U. S. 468; Reed v. Peterson, 91 Ill. 291.

The property in controversy belonged to the firm, composed of Thomas W., Charles and William P. Hall. On the 19th day of July, Charles and William P. executed and filed a deed of assignment purporting to convey to John Kinsey, as assignee, the property of the firm. On the 21st of July, by a separate paper, which was also filed, Thomas W. Hall joined in this paper. Until then the assignment was not valid as to this and other firm property. The subsequent ratification by Thomas W. did not relate back to the 19th, so as to cut off the rights which the appellants had acquired between the execution of the assignment by two of the partners and its ratification by the third. Holland v. Great, 29 Ohio St. 443.

In that case there was an assignment by one of two partners, then an attachment upon the firm property, and, subsequent to this, a ratification of the assignment by the other partner. The court said: "The power to make it (an assignment for creditors) is not within the contemplation of an ordinary partnership contract. * * * We think the safer and juster rule is, to require the assent of all the partners, either actually given or to be fairly implied from the situation of the parties or from the manner of conducting the business of the firm." And, speaking of the subsequent ratification, said: "It is equally well settled, however, that it can not have effect so as to defeat the rights of third persons *bona fide* acquired in the meantime." The attachment was adjudged superior to the assignment.

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Coleman v. Darling, 66 Wis. 158, is a case similar to the last one in its facts and in the principles announced. Wetter v. Schlieter, 15 How. Pr. 269, S. C., 4th Ed., Smith, 714.

One of the three partners of a firm doing business in New York City, in May went to Europe temporarily to solicit consignments, etc. While so occupied, and on November 9th, he received a letter from his partners, calling him home. On that day he replied by letter that he would return, which was received the first of December. December 5th the other two partners executed a general assignment. December 14th the absent partner reached home. Held, the two partners had no power to make the assignment. Hook v. Stone, 34 Mo. 329.

In the spring, one of two partners went to California, and acquired a domicile there; in July following, the firm being insolvent, and this partner being absent in California, the other partner, in Missouri, executed a general assignment. Held, invalid. See, also, Dunklin v. Kimball, 50 Ala. 215; Stein v. La Dow, 13 Minn. 413.

MESSRS. TENNEY, BASHFORD & TENNEY, W. S. JOHNSON, JAMES FRAKE, H. H. MARTIN and COLLIER & WALKER, for appellees.

MR. FARLIN Q. BALL, for John Kinsey, assignee.

In this class of cases the County Court sits as a court of chancery, with power to take all necessary or proper orders in the cause. It is custodian of all the assets, and the trustee (through the assignee) of all the creditors of these insolvents. It distributes such assets among the claimants, as their rights, either legal or equitable, or both, shall appear after it has investigated them, and such an investigation is a duty which devolves upon the County Court.

That investigation is carried on by the help of the attorney of the assignee; and the assignee, during such time, is subject to the order and control of the court, and must hold the goods to await the order of the court.

The County Court, like any other chancery court, may place the costs of the proceedings upon such parties herein

and upon such fund herein as, in the opinion of the chancellor, is equitable.

Such has always been the practice of courts of chancery.

As trustee of the general creditors and an officer of the court, it is the duty of the assignee, and of his attorney, to attend upon the court while such investigation is in progress and to assist the court in finding out what claims are valid and what are invalid. That duty carries with it the obligation to pay both the assignee and his attorney a reasonable sum for such services. To refuse to do so is the studied avoidance of a just obligation.

All the costs, expenses and reasonable solicitor's fees expended and incurred in this case by the assignee, were incurred by the order of the court and were necessary to enable the assignee to safely dispose of the assets in his hands; and therefore such costs, expenses and fees should be borne ratably by the several parts into which such assets have been divided by the court.

The assignee had *actual* possession of these assets. That must be admitted by everybody. The court, through him, had also such actual possession, and by virtue of its jurisdiction had the legal possession of such assets. Conflicting parties claimed such assets. It thereupon became the duty of the court to decide upon each of such claims. This he could do only by making the assignee a party and requiring him to aid in sifting such claims. The court therefore ordered the assignee to file the petition herein and to attend this trial. He, being a layman, was necessarily compelled to employ counsel. These facts were known from the beginning to all the claimants. The entire assets have been distributed among such claimants, and now the question comes up as to how those costs, expenses and fees shall be paid.

No case can be found in the courts of this State where the assignee in insolvency has been refused the fees of his counsel as well as his *per diem* or compensation and costs. The equity and justice of such an allowance is patent, and beyond dispute. In *Blow v. Gage*, 44 Ill. 209, such allowances were made. As to the moneys expended by the assignee and as to his services

in caring for these wools from the date of the assignment until they were finally sold, there can be no question. The assets had to be cared for by some one and that care must be paid for.

The intent of the statute is to place the entire distribution of the estate in the County Court, free from the interference of other courts. "Indeed, to permit such interference would practically defeat the chief object of the statute, namely, to provide a convenient, expeditious and inexpensive tribunal, through the instrumentality of which an insolvent debtor may make an entirely equitable distribution of his effects among his creditors. If, after the jurisdiction of the County Court has attached, third parties having real or pretended claims to or upon the trust estate were permitted by means of process issued out of other courts to take possession of the property in the hands of the assignee, for the purposes of litigation in such other courts, the County Court, by this means, might be deprived of its jurisdiction altogether. * * * To give the statute practical effect in all the provisions, we feel constrained to hold, as we do, that upon the making, filing and recording of the assignment, with the lists and schedules annexed, the County Court wherein such assignment is filed and recorded, in its character as an insolvent debtor's court, by operation of law, at once acquires jurisdiction over, and becomes possessed of all the property and estate embraced within the assignment, subject, of course, to all prior liens and just claims; that third parties may have to or upon it." *Hanchett v. Waterbury*, 115 Ill. 227.

It can not be questioned that, under our statute in relation to voluntary assignments for the benefit of creditors, the County Court is invested with exclusive jurisdiction to control, administer upon and distribute the trust estate, and to control the assignee in the discharge of his duties. *Freydendall v. Baldwin*, 113 Ill. 325; *Hanchett v. Waterbury*, 115 Ill. 220; *Colburn v. Shay*, 17 Ill. App. 280; *Preston v. Spaulding*, 18 Ill. 134.

This, however, does not result from any express words of the statute conferring the jurisdiction on the County Court,

and prohibiting the other courts from exercising it, but is only an application of the familiar and long-established rule that, in cases of concurrent jurisdiction, the court which first obtains it will have precedence. By the execution and recording of the assignment, the County Court obtains jurisdiction of the estate vested in the assignee by the assignment, and from that time its jurisdiction must have precedence over that of other courts. *Boyden v. Frank*, 20 Ill. App. 176.

The jurisdiction of county courts in cases of voluntary assignments for the benefit of creditors is a special statutory jurisdiction, and proceedings in that court, in the exercise of that jurisdiction, though incapable of being enumerated in any proper sense, as proceedings either at law or in chancery, are, in all their essential characteristics, much more nearly analogous to the latter than the former. Such proceedings are very similar in their main features to those adopted by courts of chancery in administering upon estates or property through the agency of receivers. The petition in this case is a mere summary application to a court exercising this statutory and *quasi* equitable jurisdiction, to release from its control, and hand over to the petitioner, certain property which its assignee claims to hold under the assignment, but which the petitioner claims belonged to him, and so did not pass by the assignment to the assignee. *Traver v. Rogers*, 16 Ill. App. 374; *Colby v. O'Donnell*, 17 Ill. App. 474; *Messinger v. Yager*, 16 Ill. App. 260.

Our statute in regard to costs does not profess to repeal any rule of the courts of equity relating to costs.

"It was never the intention of the Legislature to compel a trustee to carry on litigation in defense, or for the enforcement of the rights of the person or estate represented, out of his own pocket. Such a rule would put an end to all trusts, for want of persons to accept the burdens and responsibilities of them. No man would take upon himself the care of the estates of others, knowing that he must bear the expenses of litigation without indemnity.

"I entertain no doubt but that it is still in the power of courts having equity jurisdiction to allow to trustees and

others suing or defending in *autre droit* such reasonable counsel fees and disbursements, in addition to the costs given by the code, as they may deem sufficient to indemnify them against loss." *Rose v. Rose*, 28 N. Y. 184. (The New York statute in regard to costs is much more elaborate than is ours.)

Chancellor Walworth, in the teeth of the rule in the State of New York that the trustee is entitled to no compensation for his services, considering the justice of the claim, extended the statute giving compensation to executors, etc., to the case of an assignee in insolvency and gave him the same commissions and his expenses. *Meacham v. Sternes*, 9 Paige, 398.

The same conclusion was reached after surmounting the same legal difficulties by Chancellor Taylor in a case of a trustee appointed by a deed of trust, he saying that it was inconsistent with natural justice to ask for the services of a trustee and then to refuse to pay him a reasonable compensation therefor. *Miller v. Beverley*, 4 Hon. & Munf. 415.

"Voluntary assignees are not entitled to charge a commission as such, unless they have taken care to secure to themselves the right by express reservation or agreement; although in many cases, I have no doubt, with a view to compensation upon the ground of *quantum meruit*, the court would do right to adopt, by analogy, the same rate of commissions which guardians, executors and administrators are authorized by law to charge for similar services." *Jewett v. Woodward*, 1 Edw. Ch. 199.

Where the assignment was void "the trustees have the right as against the plaintiffs (creditors) to deduct from the amount in their hands the expenses of keeping, taking care of and selling the property, as well as a reasonable compensation for their services." *Bishop v. Trustees*, 28 Vt. 71.

"The costs, charges, expenses and disbursements attending the execution of the trust (an assignment) are not specifically enumerated (in the deed). The law allows such charges upon the fund, but requires them to be reasonable. They are

always subject to be reviewed by a court of equity; and although the deed had not contained such a provision, the law would have authorized the retention of all such reasonable charges." *Blow v. Gage*, 44 Ill. 213-214.

An executor is entitled to a credit in his account for fees paid to counsel for their professional services in establishing the validity of the will, and the bequests therein contained, where the legatees entitled to the estate are the parties in interest. *Scott's Est.*, 9 Watts & S. (Pa.) 98.

The allowance to executors in proper cases of a reasonable counsel fee, is general. *Morton v. Barrett*, 22 Me. 257; *Bendall v. Bendall*, 24 Ala. 275; *Copehart v. Huey*, 1 Hill Eq. 405; *Day v. Day*, 2 Green's Ch. 549; *Atcheson v. Robertson*, 4 Rich. Eq. 39; *Hester v. Hester*, 3 Ind. Eq. 9.

"It is also the settled doctrine that executors and other trustees who have acted fairly, or who have resisted a claim in good faith merely by way of submission, shall have their costs out of the fund." *Rogers v. Ross*, 4 John. Ch. 608.

No prudent person would undertake the duty of a trustee, a *prochein ami*, or a relator to an information in behalf of a charity, in all which cases the proper execution of his duty might make it necessary for him to incur expenses which could not strictly come under the head of costs, if the court when satisfied of the correctness of those charges, could not order them to be reimbursed under the head of just allowances. *Fearn v. Young*, 10 Vesey, 184.

"Nor shall we interfere with the order in regard to costs. 'The accountant was a 'good trustee' says the auditor. * * * Nobody will serve as trustee if liable to be 'harassed at every step about such small things.'" *Graves' Appeal*, 50 Pa. St. 193.

"The defendant, as administrator in an amicable suit concerning the will of his deceased, was allowed his taxable costs out of part of the estate.

"As the defendant is not in default, and has only sought the direction of this court in a case proper for it, he ought to receive costs out of the fund; and this is the course of the court in such cases." *Morrell v. Dickey*, 1 John. Ch. 156.

Trumbull v. Union Trust Co.

GARNETT, P. J. From the statement of facts it is clear that the amount of money advanced by the Union Trust Company upon wool shipped by Ayers & Fell, and which was still unpaid at the time of the hearing in the County Court, is purely conjectural. It is admitted that the entire account of Hall & Co. with the trust company was at all times kept as one individual account. The various payments on, and renewals of all the Hall & Co. paper, made after the last advance on that wool, appear to have hopelessly destroyed all traces of the identity of those advances. No effort was made to prove that the payments were not properly applicable to these specific items in the absence of directions by the debtors to apply them differently. No special application by the trust company of such payments is shown. No fact or circumstance in proof furnishes a foundation for any presumption in favor of the trust company's contention that a specific amount of the remaining debt of Hall & Co. represents part of the advances on the Ayers & Fell wool. The trust company affirmatively asserts that at the date of the assignment, Hall & Company owed it a certain sum of money, which by agreement was made a lien on certain wool in the warehouse of the debtors. To maintain that allegation the burden of proof was on the party making it. It was necessary to prove, not only that Hall & Co. were in debt to the trust company, but that the debt proved, or some specific part of it, was *the* debt which the debtor had agreed to secure by lien on the wool. Changes in the form of the debt would not affect the security, but the payments made may have extinguished the liability in question. It certainly appears from the evidence that payments were made in amounts sufficient to satisfy all the advances on the Ayers & Fell wool. If these payments should be applied to other items in the account, the claimant should have proved the facts requiring that application. It is unnecessary to enter into a critical analysis on other points of the evidence offered in support of the claim of the Union Trust Company, as the most liberal inferences warranted by the proof do not justify the finding of a lien in its favor. The court erred in awarding to it a

better standing than that of the general creditor without security.

A serious question is presented as to the authority of the two partners to make the assignment without the third joining in, or authorizing its execution, yet we think the current of authority and the better reasoning establish the rule that an assignment of that character can not be made in the absence of the other partner and without his authority, unless a crisis has arrived in the affairs of the firm, and the absent partner can not be consulted, personally or otherwise, in time to avoid or meet the threatening emergency. If these conditions exist, authority from the absent partner to make the assignment is implied. Ratification by the absent partner does not operate to divest the rights of purchasers and lien holders, acquired in good faith after the execution of the first instrument, and before the ratification. 1 Bates on Partnership, Secs. 338, 339; *Stein v. La Dow*, 13 Minn. 412 (381); *Holland v. Drake*, 29 Ohio St. 441; *Coleman v. Darling*, 66 Wis. 155; *Hook v. Stone*, 34 Mo. 329.

The case in hand is not within the exception. *Thomas W. Hall* on July 19, 1888, was absent from Cook county; where he was, is not proved. For aught that appears, he could have been personally interviewed by another member of the firm within an hour's ride of Chicago. If not, he may have been accessible, at a more distant point by telegraph or telephone. If he was in Montana, as stated by counsel, there is no reason to believe he could not be reached by wire. At all events, the record is barren of evidence as to his whereabouts when the supposed assignment was executed, and the instrument was inoperative to pass title until it was ratified by him on July 21st. To the suggestion that the interest of the two partners executing, if nothing more, passed to Kinsey, the reply is simple. That was not their intention, or the intention of the assignee in accepting the supposed trust, nor could they in that manner terminate the partnership. The law absolutely denies the power of two out of three partners to assign under these circumstances, and is not so inconsistent as to permit an act to be done indirectly when it refuses to

allow it to be done directly. If this conclusion is correct, there was nothing to prevent the storage company from taking possession on July 20th of the premises of which it held leases, and the wool there stored. We are unable to see that it makes any difference that it contrived to take possession by deceiving Kinsey. *Stearns v. Sampson*, 29 Me. 568. At that time he had no right as against the storage company. Although the evidence is convincing that its so-called possession prior to July 20th was a mere pretense, and would have been wholly insufficient to protect it and its receipt holders against a judgment creditor of, or *bona fide* purchaser from T. W. Hall & Co., the action taken by it on that day was sufficient (so far as the wool covered by its receipts was concerned) to make its title complete against the assignors, assignee and general creditors to the extent of the advances of its receipt holders, which remain unpaid. The argument that the receipt holders have no better footing in the case than the storage company, and that it can have no rights because the evidence shows that its arrangements with Hall & Co. were intended by both parties to procure for the firm a credit from others which would not have been extended if their relations were made known, is not sound. The receipt holders are free from fault, whatever may be said of the storage company. They advanced their money on the receipts in good faith, having no reason to believe that any such intention existed as is charged, or that the possession of the storage company would be so evanescent that their investments would be in constant danger. Why should they be visited with a penalty, which, if inflicted at all, should be borne only by the transgressors? It is true that appellant's success in this case is a measure of indirect benefit to the storage company. But whatever infirmities may be charged to the law, it never consents to the punishment of the innocent for fear the guilty may flourish.

The proceeds of all the wool on the second and third floors, except what was directed to be paid to Patterson Brothers, Lieneman & Schmidt, Grande Brothers and Parberry and Kertz, should be awarded to the storage company for use of its receipt holders, deducting the expenses as hereinafter directed.

The evidence shows to our satisfaction that Patterson Brothers' wool, to the extent of the proceeds of sale were awarded to them by the decree, was in the warehouse of Hall & Co. at the time of the assignment, and was distinguishable from all other wool there. That is also tacitly conceded by appellants to be the case with the wool found by the decree to belong to Lieneman & Schmidt; and it sufficiently appears that, although Grande Brothers' wool was lost sight of, other wool was substituted for, and received by Hall & Co. in place of it. The shipments by Parberry and Kertz consisted of Montana wool. After it was received in the warehouse, each of their shipments was graded, and that belonging to each grade was mixed with other wool of the same grade; but no account appears to have been kept of the quantity of any grade belonging to either shipper, nor does the evidence disclose how much of any one grade was received from either Parberry or Kertz. There was some evidence of a custom authorizing the factor to mix consignments of the same grade from his several customers, but the custom testified to, falls far short of permitting the disposition made of the Parberry and Kertz wool without taking any precaution to ascertain the quantity in each grade. It would seem, therefore, clear, that Hall & Co. were guilty of confusion when they thus obliterated all traces of the property of these two consignors. Against these wrongdoers, certainly there should be an effectual remedy, and we think that applied by the court in allowing the owners of the wool less than the average proceeds of those grades of wool was none too liberal. The doctrine of confusion is intended to make the wronged party whole beyond all doubt, and had the decree found Parberry and Kertz entitled to the proceeds of every pound of wool out of the best grade with which it was mixed, there might be serious difficulty in disputing the propriety of the finding. 2.Schouler on Personal Property, Secs. 43, 47, 48. Appellants were not absolute purchasers, but merely lien holders or pledgees, and so they have no better standing against these consignors than the factors, Hall & Co., would have. Jones on Pledges, Secs. 328, 329, 331. The decree in favor of Patterson Brothers,

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Lieneman & Schmidt, Grande Brothers, Parberry and Kertz, is not erroneous.

The claims of Vehmeyer and the Lincoln National Bank were correctly disposed of. They were based on what purported to be warehouse receipts issued by T. W. Hall & Co. That firm was never in the business of warehousing, although they had for several years issued what were in form warehouse receipts of their own property stored in their own warehouse. That course of business does not make what is known as a warehouseman, nor does a receipt of that character furnish any greater protection to the holder than an unacknowledged chattel mortgage.

No attorney's fee should be deducted from the share of appellants in the proceeds of the wool. The attorney's fee should be paid by the assignee from the general fund, except so far as the direction to pay from the shares of the several parties having priorities was consented to or not complained of. So far as the other charges and expenses are concerned, the decree is approved.

Patterson Brothers, Lieneman & Schmidt, Grande Brothers, Parberry and Kertz will recover their costs in this court against appellants. Vehmeyer and the Lincoln National Bank will be charged with their own costs, and appellants will recover one-third of their costs from the Union Trust Company. We think no error is disclosed by the record aside from those pointed out herein.

The decree is reversed and the cause remanded with directions to the County Court to enter a decree in conformity with this opinion.

Reversed and remanded with directions.

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LOUIS J. DAEGLING

v.

THE ILLINOIS VAULT COMPANY.'

*Master and Servant—Building Contractor—Extras—Recovery for—
Delay—Damages—Evidence—Instructions.*

1. No complaint can be made of a refusal to give a certain instruction, where the substance thereof is contained in one given.

2. In an action by a building contractor to recover for alleged extra labor and damages for delay, this court declined, in view of the evidence, which was conflicting, to disturb the verdict for the defendant.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ABBA N. WATERMAN, Judge, presiding.

MESSRS. E. A. OTIS and WALTER MATTOCKS, for appellant.

MESSRS. ABNER SMITH and J. M. CLEAVER, for appellee.

It is the settled law of this State that, if the jury have been properly instructed as to the law involved in a case, the judgment will not be reversed, although some of the refused instructions may contain correct statements of law. And there will be no error in refusing to give an instruction when the substance of it has been given in another. *Hessing v. McCloskey*, 37 Ill. 342; *McKichan v. McBean*, 45 Ill. 228; *Chicago & Eastern R. R. Co. v. Holland*, 122 Ill. 461.

The law was fully and correctly stated in the first instruction given for plaintiff, appellant, and the instruction embodies substantially and fully the law as asked in the instruction that was refused. And this style of comprehensive instruction has been highly commended by the Supreme Court. *Hanchett v. Kimbark*, 118 Ill. 121.

As to the bill for extra work, in which was included an item of \$765 for excavation, little need be said, since by the contract it was to be determined by the architects, Burnham & Root, whether it was included in the contract, and they decided, before it was done, that it was included in the contract, and the plaintiff, before commencing to excavate, acquiesced in their decision.

GARY, J. The appellant, by contract with the appellees, did the excavation and mason work in substantially rebuilding a structure burned down. He claimed for extra excavation

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and damages for delay. The error here assigned as to the first claim is the refusal of this instruction:

“If the jury believe from the evidence that the said architects, Burnham & Root, did not, as a matter of fact, pass upon the claim made by the plaintiff for excavating, but left that matter to be determined by the superintendent, who refused to allow the plaintiff pay for said work, then such act would not be binding upon the plaintiff.”

But, at the instance of the appellant, the court had given this: “The jury are instructed that when the contract provides that the decision of the architect shall be final and binding upon the respective parties to the contract, such agreement does not contemplate that said architect shall do otherwise than to exercise his fair and honest judgment in passing upon the value of the material and services rendered, and such discretion on his part can not be delegated to his superintendent or any other person in his behalf; and in case the exercise of such judgment should be delegated to the superintendent in charge of the work, or to any other person, for his decision, then such a decision would not be binding upon either party to said contract, but such architect may use the services of a superintendent or other person to obtain information as to such work, materials or services, and may act upon such information; the parties who have agreed to submit matters to the decision of two architects are entitled to a decision which is the decision of both.”

Whether, under the contract and specifications, which were put in evidence, without the drawings to which the latter referred, the appellant could make any claim for extra excavation, need not be decided. The instruction given embraced all that the one refused contained.

The claim for damages for delay was fairly submitted to the jury upon conflicting evidence, and the verdict is conclusive.

There is no error and the judgment is affirmed.

Judgment affirmed.

MARK COHEN

v.

HENRY A. SMITH ET AL.

Attachment—Affidavit—Garnishment—Remittitur—Change of Attorney—Equitable Assignments—Costs—Publication—Default.

1. Upon default after publication in attachment proceedings, a judgment for too large an amount can not be cured by a *remittitur*, for the reason that the record can not show that the merits as to the residue are with the party in whose behalf the same was entered.

2. A change of attorney, if not made by voluntary arrangement, must be done by order of court.

3. The authority of an attorney of record can not be interfered with until the same is revoked.

[Opinion filed July 2, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. GARDNER, McFADON & GARDNER, for plaintiff in error.

Cohen sues out a writ of error, and assigns for error the rendition by the Superior Court of the judgment against him for \$1,398.35 on the 24th of April, 1885; that the said Superior Court had no jurisdiction over him to render said judgment.

1. Because the notice did not show for what amount the suit was brought.

In attachment proceedings the Superior Court exercises a special statutory power, and hence in such proceedings is governed by the same rule as courts of limited jurisdiction, and all facts necessary to give jurisdiction must affirmatively appear on the record and can not be proven by parol. *Haywood v. Collins*, 60 Ill. 328, 333.

Where defendant in such proceeding is neither personally served nor enters his appearance, the jurisdiction of the court

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can attach only by a publication of the notice specified in Sec. 32, Attachment Act, (Starr & C. Ill. Stats.), and the record must show affirmatively, compliance with the requirements of said section. *Haywood v. McCrory*, 33 Ill. 459.

Said notice must show "for what sum" the attachment is brought, and unless it does so is defective, as defendant should have a right of election whether or not to contest the claim. *Haywood v. Russell*, 44 Mo. 252.

The notice published in the case at bar stated that the attachment writ, issued February 2, 1885, was for the sum of \$923.12, while the amount due by the affidavit for attachment was over \$1,300, and the judgment rendered April 24, 1885, was for \$1,398.35.

The following cases show the necessity of the notice complying exactly with the statute.

In the case of *Durossel's Adm'rs v. Hale*, 38 Mo. 346, the court held a notice of publication which failed to state, as required by the laws of Missouri, that defendant's property had been attached, was for that reason bad, and a sale of land in that proceeding was held void. *Varien v. Edmonson*, 5 Gilm. 270.

The recitals in the judgment do not correct the defect in the notice, as the proceeding here is a direct proceeding to set aside the judgment, and not a collateral one. *Dow v. Whitman*, 36 Ala. 604; *Randall v. Sanger*, 16 Ill. 27; see *Harris v. Lester*, 80 Ill. 307.

See also opinion by Sheldon, J., in *Haywood v. Collins*, 60 Ill. 342, and opinion by Scott, J., in *Botsford v. O'Connor*, 57 Ill. 85.

Even in collateral proceedings, where defects in publication of notice are considered to be covered by a finding in the judgment that due proof of publication was made, unless the judgment so states, a judgment rendered on a notice not certified to have been published by a publisher has been held void. *Haywood v. Collins*, 60 Ill. 328.

2. Because the judgment rendered exceeded the sum stated in the affidavit, and subsequently accruing interest.

The affidavit for attachment filed in this case claimed as the

principal sum due the plaintiff, \$923, and as interest six per cent upon that sum from September 27, 1877.

The interest upon \$923 from September 27, 1877, to April 24, 1885, at six per cent, is \$419.48, which added to the principal sum makes a total sum of \$1,342.48.

The judgment rendered on April 24, 1885, was \$1,398.35, exceeding the amount of the sum stated in the affidavit and subsequently accruing interest by \$55.87.

The above facts make an exactly similar case to that of Forsyth v. Warren, 62 Ill. 68, where the court held the judgment void.

Messrs. EWING & EWING, for defendant in error.

GARY, J. This was an original attachment commenced February 2, 1885, in the Superior Court by the defendants in error against the plaintiff in error. There was no personal service. The affidavit for the attachment stated the indebtedness to be \$923, with interest at six per cent per annum from September 25, 1877, for money received. The writ and published notice stated only the \$923, omitting any allusion to the interest. April 24, 1885, judgment by default was entered against the plaintiff in error for \$1,398.35.

The New York Life Insurance Company was summoned as garnishee, and judgment rendered against it in favor of Cohen for the use of Smith et al., for \$1,691. That the judgment against the plaintiff in error is erroneous, is settled by Forsyth v. Warren, 62 Ill. 68, and cases there cited; and if the error could be cured by a *remittitur* in this court, remitting, as has been done, \$55.87, is only an attempt to bring the amount down to correspond with the original affidavit, while the excess above the amount stated in the publication notice, is the error. The intimation in *Steamship Clarion v. Moran*, 18 Ill. 501, is, that the error could not be cured by a *remittitur*. The practice is now more liberal, but it would seem, as amendments are allowed only in furtherance of justice, that to make a *remittitur* effectual, it should affirmatively appear by the record that the real merits as to the residue, after the

remittitur, are with the party who has the judgment. On default, after publication only, this can not be apparent.

After errors were assigned here, another attorney than those of record for the plaintiff in error put in a motion, supported by affidavits of his authority from the plaintiff in error to do so, to dismiss the writ. That mode of proceeding is not regular. While a party to a suit has the right to change his attorney, yet, if such change is not in fact made by voluntary arrangement, it must be done under the order of the court. 1 Tidd's Pr., 94.

The authority of the attorney of record is presumed. Ruckman v. Allwood, 40 Ill. 128; Williams v. Butler, 35 Ill. 544; Reed v. Curry, 35 Ill. 536; and no other attorney can interfere while that authority is unrevoked. Ginders v. Moor, I. B. & C. 654, S. O., 8 E. C. L. 276.

If, as is probably the fact, the defendants in error had ploughed with the plaintiff in error, they might have obtained his release of errors, and pleaded it, and put the case in a troublesome shape. Kern v. Zink, 55 Ill. 449; Ruckman v. Allwood, 40 Ill. 128.

It appears, however, that by arrangement with the plaintiff in error, this writ was sued out in his name, and has been prosecuted by, and at the expense of, the New York Life Insurance Company. He has, therefore, no right to control the case. All that he can claim is indemnity against the costs. The principle which protects the assignee of a non-negotiable chose in action, after notice to the party liable, against the subsequent acts of the assignor, applies here for the protection of the company. See Creighton v. Hyde Park, 6 Ill. App. 274, and cases cited there.

There is no showing that for any consideration, the parties to this writ have dealt with other, with or without notice to the defendants in error, of the interests of the company in the suit. The transaction between the plaintiff in error and the company amounts to an equitable assignment to the company of the cause of action, namely, the right to reverse the judgment in this case for error to the company. Bispham's Eq., Sec. 164.

That cause of action was a proper subject of assignment, being of value to both parties. *Everett v. Central Iowa*, 35 N. W. 609; *Davis v. St. L. & S. F.*, 25 Fed. 786; *Greenhood's Pub. Pol.* 420 *et seq.*

And specially is it of value to the company, presumably solvent, as a means of getting rid of a large judgment against them. For if the judgment against the plaintiff in error be reversed, the judgment against the company dependent upon the former, falls with it. 3 Bac. Abr. 384-5; *Error M. 2 Saund. R.* 101 aa; *McJilton v. Love*, 13 Ill. 486.

The judgment is reversed and the cause remanded.

It will be in order after the cause is reinstated in the Superior Court, for the company to move to set aside the judgment against them.

Reversed and remanded.

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WILLIAM PATTERSON

v.

ANDREW J. SCOTT ET AL.

Gaming—Criminal Code, Sec. 135—Chap. 46, R. S. 1845—Sec. 2, Chap. 13, R. S.—Decrees—Judgments.

This court holds that the right to relief under Sec. 135 of the criminal code upon the ground that money for which decrees by default were entered in the trial court was lost in gaming, is not foreclosed by the failure to set up the same as a defense in the first instance.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MESSRS. SETH F. CREWS and ERNEST DALE OWEN, for appellant.

Mr. E. H. MORRIS, for appellees.

GARY, J. This is an appeal from a decree of the Superior Court in chancery. The appellant sought relief from former decrees of the Circuit Court, entered by default.

Without going into detail, it is enough to say that the appellant based his title to relief upon Sec. 135 of the criminal code, which provides that "all judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements and other acts, deeds, securities or conveyances, given, granted, drawn or executed contrary to the provisions of this act, may be set aside and vacated by any court of equity, upon bill filed for the purpose, by the person so granting," etc. This section was taken from Chap. 46, R. S. 1845, entitled "gaming," and incorporated, with other provisions of that chapter in the criminal code, by the revision of that code, in 1874. Such provisions are therefore to be construed as a continuation of the prior provisions, and not as a new enactment. Sec. 2, Chap. 131, R. S. The appellant by his bill shows that these former decrees were for money lost at gaming. His present bill is not to be considered a bill of review of those decrees, but an original bill for relief under the statute. As such, the appellees urge that decrees in chancery are not embraced in the words of the statute; that having his day in court, where he might have availed himself of the defense that the money was lost in gaming, the appellant, by his neglect, is effectually foreclosed from all relief.

While usually the word judgment denotes the determination of an action by a court of law, yet in a large sense it embraces the decision of any court. Bouvier's Law Dictionary; Webster's Dictionary; In the matter of Negus, 10 Wend. 34; In re Road, 103 Pa. St. 250. And the spirit and object of the statute takes in every form of security, the consideration of which is a gambling debt.

The recent case in the Supreme Court, West v. Carter, 129 Ill. 249, recognizes the authority of Mallett v. Butcher, 41 Ill. 382, that the title to relief under the original statute was not lost by neglecting to make the defense at the first opportunity.

The decree of the Superior Court, sustaining the demurrer of one appellee, and dismissing the bill on the motion of the other, is erroneous; and it is reversed and the cause remanded. If the decrees which the bill attacks should be set aside, subsequent proceedings, based upon them, fall with them. *Bac. Abr.*, title Error, M; *McJilton v. Love*, 13 Ill. 486.

Reversed and remanded.

JOSEPH B. ASHFORD
v.
WILMER A. WORRELL.

Master and Servant—Building Contract—Balance Due—Extras—Evidence.

In an action brought to recover a balance claimed to be due under an oral contract to build several houses, and for extra work, this court declines, in view of the evidence, to disturb the verdict for the plaintiff.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. JOHN C. SCOVEL, for appellant.

Messrs. SCALES, BOYLE & SMITH, for appellee.

Per Curiam. We are urged by the appellant to reverse the judgment in this case on the ground that the verdict for the jury is against the evidence, and that justice has not been done.

The action was brought to recover a balance claimed by appellee to be due him on a contract for building certain houses for appellant, and for certain extra work. We have examined the evidence presented in the record and find a conflict between appellant and appellee on the material issues in

Chicago West Division Ry. Co. v. Ingraham.

the case. The contract for building several cottages was not put in writing, and according to general experience it would be very singular if there was not a dispute between the owner and the contractor as to its terms. If parties will be so careless and unbusiness-like as to have such contracts resting in parol, they must be satisfied with the conclusions which juries reach when litigation arises, in reference to their terms and obligations. It can not be said that the verdict in this case is without support in the evidence, or that the evidence preponderates against it to such an extent as to warrant its being set aside as being manifestly against the weight thereof. There is no error of law, and the jury who saw and heard the witnesses have seen fit to believe appellee's version of the facts, and have determined the conflict in his favor by the verdict, which has received the approval of the trial judge.

Under the circumstances this court is not warranted by anything disclosed in the record, in interfering, and the judgment must therefore be affirmed.

Judgment affirmed.

CHICAGO WEST DIVISION RAILWAY COMPANY

v.

SERENO W. INGRAHAM.

Street Railway Companies—Personal Injuries—Negligence—Evidence—Preponderance of—Instructions.

An instruction setting forth that a street railway company has an absolute right of way over its track, against all foot passengers and vehicles, without regard to circumstances, should not be given.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. W. B. KEEF and EDMUND FURTHMANN, for appellant.

Messrs. HYNES & DUNNE, for appellee.

GARNETT, P. J. A trial of this action on the case, for personal injuries to appellee, before the court below and a jury, resulted in a verdict and judgment for \$1,000 against appellant.

It is insisted that the verdict was contrary to the clear preponderance of the evidence and should, for that reason, have been set aside by the trial court. Seven witnesses were called by appellant, four of them giving an account of the occurrence which was contradicted, in what may be regarded as the turning point of the case, by the other three, and the account given by the latter agreed, in substance, on that point, with the evidence of the appellee's witnesses. Moreover the evidence of the four witnesses who support appellant's theory, is open to some fair criticism on the ground that it presented a state of facts which was not consistent with the natural order of things, and that feature of the case was no doubt considered as entitled to great weight. Allowing the jury their long recognized privilege of fairly deciding upon all disputed questions of fact, we must decline to interfere with their verdict in this case, as it is not at all clear that the preponderance of the evidence was not with appellee.

The refusal of appellant's ninth instruction, in the form requested, is also urged as a ground for reversal. The instruction as asked asserted an absolute right of way in appellant over its track, against all foot passengers and vehicles, without regard to the circumstances. So broad a claim has not before been presented, so far as we are informed, and, if well taken, is a complete defense for such corporations in all cases of injury to persons or property on their tracks. From that proposition we must be permitted to dissent, as it is clearly untenable. The judgment is affirmed.

Judgment affirmed.

ROBERT H. PUGH, FOR USE, ETC.,
V.
THE MERCHANTS BANK OF CANADA.

Banks—Depositors—Account—Alleged Error in.

Upon suit brought by a former depositor against a bank to recover a certain amount alleged to have been wrongfully charged to him by it, this court declines, in view of the evidence, to disturb the verdict for the defendant.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. RICH & STONE, for appellant.

Mr. ELI B. FELSENTHAL, for appellee.

GARY, J. The appellees did a banking business in Winnipeg, and the appellant deposited with them. His account was a small one. March 20, 1883, the appellees charged him with a note due, \$400.25, and a check, \$400. He says the check was given by him, for the note, to the manager of the bank, on the afternoon of March 19th. The manager denies it.

The check was burned up after it was returned to the appellant when his account was written up. If it could have been produced the bank officers would have had upon the check itself indications showing whether the paying teller gave currency for it, or the note teller received it in payment of a note. The paying teller says his books show that it was paid in currency though he remembers nothing of the transaction.

June 18th, the appellant asked how much he had to his credit, says another officer, and being told \$8, drew \$7, saying he did not wish to close the account. This was the last business between the parties. In the spring following, here in

Chicago, says the appellant, he was going over his books and vouchers, and then found that both note and check had been charged to him. The jury did not believe his story, and that ends that controversy.

As to the balance of one dollar, when the appellant shall have, or cause to be presented to the counter of the bank a check for it, if they will not pay it, he will have an action for it, but not until then. *Morse on Banking*, 41. There is no error and the judgment is affirmed.

The irregularity in permitting a witness to be examined orally after his deposition had been read by the same party, can in this case have done no harm.

Judgment affirmed.

33 354
53 349

MAGGIE O'MALLEY

v.

CHICAGO CITY RAILWAY COMPANY.

Street Railway Companies—Negligence of—Personal Injuries—Evidence—Damages—New Trial.

A plaintiff not entitled to recover at all, has no right to have a verdict for the defendant set aside, nor one in his own behalf, because the damages are less than the pecuniary injury.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

MR. FRANK H. CULVER, for appellant.

MR. WILLIAM J. HYNES, for appellee.

GARY, J. The appellant obtained a verdict against appellees upon her own unsupported testimony, in conflict with

Elton v. Brettschneider.

that of two disinterested witnesses, as to her right to recover at all, upon the charge that she had sustained personal injuries by their negligence, but the jury gave her only \$100. She moved for a new trial because the damages are inadequate.

It may be conceded that the action of the jury was inconsistent, but the concession would furnish no consistent reason for inconsistency in the action of the court. If this case had come here with the reasons of the judge of the Superior Court for denying the new trial, stating that he would grant it on the authority of *Peaslee v. Glass*, 61 Ill. 94, if the defendant would apply for it, but that on the application of the plaintiff he could not grant it, as she had already more than she was entitled to, could this court, which as to verdicts, has authority only to correct errors of the court, say that such decision was error? And that is what this record, by fair inference, says. A plaintiff, not entitled to recover at all, has no right for any reason to have a verdict for the defendant set aside. *Garland v. C. & N. W.*, 8 Ill. App. 571; nor one in his own or her own favor, because the damages awarded are less than the pecuniary injury. *Hubbard v. Mason City*, 64 Iowa, 245.

Judgment affirmed.

GEORGE A. ELTON

v.

FERDINAND BRETTSCHEIDER.

Judgments—Default—Payment in Part—Failure to Credit—Bill for Relief.

Upon a bill filed for relief from part of a judgment by default, it being alleged that certain payments had not been credited, this court holds that the reasons adduced for not defending were insufficient, and declines to interfere with a decree dismissing the same.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. HENRY M. SHEPARD, Judge, presiding.

Mr. C. J. BEATTIE, for appellant.

Messrs. BURKE & HOLLETT, for appellee.

GARY, J. This is a bill filed by the appellant to be relieved from a part of a judgment by default against him in favor of the appellee, on the ground that he had paid money on account which was not credited to him, so that the judgment was \$240.97 too much.

As excuse for not defending the suit, he alleges that he was summoned to the August term; went to the court rooms on the morning of the first Monday in August, found no courts in session, and was told by various officers of the court that there would be no court until September 17th; that he believed them, and his attorney being out of town he paid no more attention to the suit. That he did not know until the term was over, that judgment had been taken.

Equity can not give relief on such grounds. The appellee is not chargeable with the consequences of the appellant's ignorance or negligence, and the decree dismissing the bill is affirmed. *Albro v. Dayton*, 28 Ill. 325.

Decree affirmed.

J. OBERMANN BREWING COMPANY

v.

CAROLINE OHLERKING.

SAME

v.

SAME.

Evidence—Testimony of Husband in Behalf of Wife—Sec. 5, Chap. 51, R. S.

Keating v. Nelson.

In the case presented, this court holds that the husband of the plaintiff was properly allowed to testify in her behalf.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. B. M. SHAFFNER, for appellant.

Mr. WILLIAM MUNN, for appellee.

GARNETT, P. J. The questions in each of these cases are identical. Appellant claims that the judgment in each case should be reversed, because the trial court admitted the husband of appellee to testify as a witness in her behalf.

Sec. 5, Chap. 51, R. S., makes the husband a competent witness in cases where the litigation concerns the separate property of the wife. He is a competent witness although her title is not admitted. *McNeil v. Zeigler*, 68 Ill. 224.

These two suits are based on the same guaranty as that referred to in *Obermann Brewing Co. v. Ohlerking*, 33 Ill. App. 26, and the judgments are for other moneys due under such guaranty.

All other questions on these records are disposed of adversely to appellant by the opinion in that case.

The judgment in each case is affirmed.

Judgment affirmed.

MICHAEL KEATING
v.
WILLIAM P. NELSON.

Master and Servant—Building Contractor—Balance Due—Recovery of—Architect's Certificate—Poor Quality of Work—Evidence.

A building contractor alone signing a written agreement making the de-

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cision of the architect of a given structure final in case of a disagreement with its owner, and the contract price payable in installments upon presentation only of the architect's certificate, said instrument showing upon its face that it was to be executed by both the owner and contractor, and was not to bind either unless both were bound, may recover for services rendered regardless of the same.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Messrs. HYNES & DUNNE, for appellant.

Mr. CHARLES F. WHITE, for appellee.

GARNETT, P. J. In March, 1885, appellee made an agreement with appellant to do the painting and glazing of two buildings on Vernon avenue, in Chicago, which appellant was then erecting, according to specifications which had been prepared by the architects of appellant.

The contract price for the work was \$823. Appellee proceeded with the work and on April 23, 1886, when it was about two-thirds completed, his brother called on the architect for a payment on account. The architect then insisted on the execution of a written contract, making his decision final in case of any disagreement between the parties relating to the performance of any agreement therein contained, and making the contract price payable in installments of \$500 and \$323 on presentation of certificates of the architect.

Appellee's brother accordingly signed the contract for appellee and received a certificate for \$500, which appellant paid. It is admitted that the execution of the agreement was by authority impliedly given by appellee, but there is no pretense that prior to that time any written contract was ever agreed on or spoken of between the parties, nor is there any evidence tending to prove that Keating ever saw or heard of, or consented to the terms of the alleged written contract before this dispute arose. It was left with the architect, who

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appears to have retained it in his possession, but so far as we are able to discover he had no authority from Keating to make himself the umpire between the parties, or to make his certificate final.

When the work was finished he refused to give appellee a certificate for the balance due, because of the alleged poor character of the work, and the defense now is that the writing governs, and nothing is due until a written certificate of the architect is presented.

It is quite plain that if the decision of the architect had been favorable to appellee, it would not have been conclusive on appellant, but he still might have defended on the ground that the work was not properly done. How appellee could be bound by the terms of the writing when appellant was in no sense a party to it, is not explained. It shows upon its face that it was to be executed by both parties, and was not to bind either unless both were bound. It was an instrument to be executed *inter partes*, or at least to be assented to by both, and contained agreements to be executed by each.

In a similar case (*Waggeman v. Bracken*, 52 Ill. 468) the court held the writing to be no evidence tending to prove an agreement between the parties. We think the ruling of the trial court, excluding the instrument in question from the jury, was correct, and as there was evidence to support the verdict, and no error intervened in the giving or refusing of instructions, the judgment is affirmed.

Judgment affirmed.

GAEY J., took no part in this case.

CHARLES S. BURCH, RECEIVER, ETC.,

v.

JAMES J. WEST ET AL.

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80	461
80	463
81	47

Insolvency—Judgments by Confession—Fraudulent Preferences—Assignment—Corporations—Officers—Acts of Receivers—Authority of.

1. A receiver is clothed with such rights of action as might have been

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maintained by the person over whose estate he has been appointed, and to whose rights for purposes of litigation he has succeeded.

2. Upon a bill filed by the receiver of an insolvent corporation attacking certain judgments confessed by it previous to his appointment, this court declines to interfere with a decree in behalf of the judgment creditors.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. O. H. HORTON, Judge, presiding.

Mr. M. P. BRADY, for appellant.

MESSRS. F. J. SMITH & HELMER, WEIGLEY, BULKLEY & GRAY, HOLDEN & FARSON and J. A. SLEEPER, for appellees.

GARNETT, P. J. On October 27, 1887, in the Superior Court of Cook County, judgments by confession were entered for various amounts in favor of James J. West and the Union Trust Company, respectively, against the J. L. Reagan Printing Company, a corporation organized in December, 1886, under the laws of this State. The next day two judgments by confession were entered in the same court in favor of Carlton Prouty against the same defendant. Execution in each case was immediately issued and levied by the sheriff on all the personal property of the company.

On the same day the first judgments were entered, West received an assignment to himself of all the accounts of the corporation, to secure indebtedness due from it to himself and others. On November 7, 1887, in a suit in equity in the Circuit Court of Cook County, brought by Luther D. Pollard and others, creditors of said corporation, in behalf of themselves and all other creditors thereof, against the corporation, said judgment creditors and others, a decree was entered dissolving the corporation and appointing John E. Wright receiver of the assets thereof, with authority to sue in all courts in the name of the company, but not in any wise interfering with said judgments, executions or levies. On the 10th day of November, 1887, appellant was duly appointed receiver in the place of Wright.

The next day appellant filed his bill in this case, attacking all said judgments. On the final hearing, the court found and decreed that the liens of the several judgment creditors, and of J. W. Butler Paper Company, an attachment creditor, were superior to the claim of the receiver.

The bill contains no allegation that the confession of judgment and assignment of accounts were in pursuance of a design to secure preferences in fraud of the chapter of the statutes concerning voluntary assignments, nor that any assignment for the benefit of creditors was made by the corporation. "Proofs without allegations are just as unavailable as allegations without proofs," (*Bremer v. Canal and Dock Co.*, 123 Ill. 110,) so that we pass this branch of appellant's argument concerning the alleged voluntary assignment and fraudulent preferences without comment, merely remarking that the opinion of the Supreme Court of the United States in *White v. Cobshausen* (not yet reported) deals with no question of pleading.

Appellant insists the judgments, executions and levies should be set aside, because the judgments were rendered on warrants of attorney executed by officers of the company without authority. The receiver is clothed with such rights of action as might have been maintained by the person over whose estate he has been appointed, and to whose rights, for purposes of litigation, he has succeeded. *High on Receivers*, Sec. 201; *Beach on Receivers*, 699; *Bouton v. Dement*, 123 Ill. 142; *Receivers v. Paterson Gas L. Co.*, 23 N. J. Law, 283; *Moise v. Chapman*, 24 Ga. 249.

The question, therefore, is, could the printing company maintain a bill on the same facts as to want of authority in its officers and secure a vacation of the judgments and proceedings thereunder? We think it clear that relief in such a case would not be granted on the prayer of the company. The debts upon which the judgments were rendered were based on valuable and adequate considerations, and the judgment creditors are not chargeable with any fraud in the transaction.

"The weight of reason and common law authority is, that

a court of equity will not enjoin a judgment at law, where there has been no service, unless it is alleged and proved that if relief be granted a different result will be obtained than that already adjudged by the void judgment." *Colson v. Leitch*, 110 Ill. 508; *Martin v. Judd*, 60 Ill. 78.

The counsel for appellant is in error in supposing that affirmative relief was granted to the judgment and attachment creditors on their answers. The decree took nothing from appellant. It only found and adjudged that the liens of said creditors were valid and the court having taken the property out of the hands of the sheriff and placed it in the hands of the receiver by the decree, the situation of the parties was simply restored as it was when the suit was commenced. This is not within the rule prohibiting affirmative relief on answer. The decree is affirmed.

Decree affirmed.

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42 171
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CHICAGO ATTACHMENT COMPANY

v.

DAVIS SEWING MACHINE COMPANY.

Landlord and Tenant—Lease—Conditions—Parol Assignment—Rent—Recovery of—Statute of Frauds.

1. The failure by a tenant to comply with a condition in a lease prohibiting the assignment thereof without the consent of the lessor, can only be complained of by the latter.

2. In an action for the recovery of a balance alleged to be due for rent under a lease assigned by parol agreement, this court declines, in view of the evidence, to interfere with the judgment in behalf of the plaintiff.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. ABBOTT, OLIVER & SHOWALTER, for appellant.

Messrs. BRYAN & HATCH and JOHN OLNEY, for appellee.

GARY, J. April 28, 1882, the appellee demised to Walter Scates and John M. Greist certain premises for a term of five years ending April 30, 1887. Scates and Greist used the name of "Chicago Attachment Company," as well as their own, in conducting their business of manufacturing sewing machine attachments. February 9, 1883, by a bill of sale, Greist sold all his interest in the property of the "Chicago Attachment Company and Scates & Greist," to Thomas S. Ridgway. In March, 1883, Scates demised a part of the premises, by a lease to which he signed the name of Ridgway as well as his own. In July, 1883, Scates & Ridgway incorporated themselves as the Chicago Attachment Company, and the company, as its record shows, resolved to receive from Scates & Ridgway all their joint property, used in their business, in full payment of the stock of the company. Scates & Ridgway made a bill of sale to the company, which was doubtless intended to include everything that the resolution called for, except the lease, or the term under it, from the appellees. Upon the lease was indorsed a consent to an assignment of the lease to the appellants, but not signed, and also the words proper for an assignment of the lease, but not signed. Thereafter upon receipts from appellees to Scates & Greist, the rent was paid by appellants, with their checks, and the premises were occupied by the appellants until July 1, 1884, and the rent paid. The appellants then abandoned the premises, and this suit is for the net residue of the rent accruing under the lease, after making some allowances which are not necessary to notice. The question in the case is whether the appellants are chargeable as assignees of the term. Whether it was in fact intended that the appellants should, by the transactions referred to, become the owners of the unexpired term, is settled by the finding of the circuit judge, in favor of the appellees. In law it is objected that the lease contained a prohibition of an assignment without the consent of the lessors, and that there was no compliance with the statute of frauds.

The first objection can not be made by the appellants; it is only available to the lessors at their election. *Webster v. Nichols*, 104 Ill. 160.

As a statute of frauds, the 29 Car. 2, Ch. 3, is not in force in this State; only the English statutes prior to the fourth year of James the 1st, have been adopted, with some exceptions. Chap. 28, R. S. Nor is there in the statute of frauds in this State, any re-enactment of or equivalent for Sec. 3 of that statute. What may be the possible effect of this omission is a subject too far-reaching to be now considered.

Even under the English statute, the assignee need not sign the assignment; his acceptance of the instrument by which the estate passes, devolves upon him the performance of the covenants running with the land. *Sanders v. Partridge*, 108 Mass. 556; *Babcock v. Scoville*, 56 Ill. 461; *Taylor's L. & T. Sec. 451*.

In *Carter v. Hammett*, 12 Barb. 253, S. C. 18 Barb. 608, it is held, notwithstanding in New York the statute of frauds embraces assignments of leases, that as between the landlord and assignee, the assignee is estopped from setting up that he is assignee only by parol agreement and not by a valid written instrument.

The appellants having then become, in fact, the assignees of the term, could only discharge themselves from liability for the rent after they ceased to occupy the premises, by parting with the residue of the term. *Taylor's L. & T. Sec. 452*.

There is language in the next section which seems to qualify this rule, but it is not warranted by the cases cited, which, especially *Astor v. L'Armieux*, 4 Sandf. 524, go upon special circumstances to which there is no resemblance here; and that case shows that a parol assignment is as effectual to discharge the original assignee, holding under an assignment in writing, as it is to charge such an assignee by parol under the doctrine of *Carter v. Hammett*, 12 Barb. 253.

Upon the facts and the law the judgment of this court is that that of the Circuit Court is right and it is therefore affirmed.

Judgment affirmed.

ASAHEL GAGE
v.
JOHN H. NICHOLS.

Injunctions—Real Property—Title—Tax Deed.

This court declines to interfere with a decree in behalf of the complainant on a bill filed by him to enjoin the issuance of a tax deed to certain real estate, upon the ground that the town taxes for the year in question were not certified to the County Court, in conformity with the statute then in force.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. EDWARD ROBY and AUGUSTUS N. GAGE, for appellant.

Messrs. E. J. WHITEHEAD and ROBERT L. LYONS, for appellee.

GARNETT, P. J. The decree complained of on this appeal was entered on a bill filed by appellee against appellant to enjoin the latter from obtaining a tax deed to certain lots in the town of West Chicago, upon a sale thereof for taxes of 1872. Against the validity of the sale appellee alleged and proved that the town taxes for that year were not certified to the county clerk, on or before the second Tuesday in August of that year, as required by the statute then in force.

In fact, the certificate required was not made for some days after the day specified in the statute. This is a fatal objection to the tax. It was so held in *Mix v. People*, 72 Ill. 241; *National Bank v. Cook*, 77 Ill. 622; *People v. Cooper*, 10 Ill. App. 384; and we have no inclination to travel over the ground already so well explored by the highest authority in the State. Section 191 of the Revised Statutes covers omis-

sions of this character in taxes levied after it became a law (Buck v. People, 78 Ill. 566), but it has no retroactive force.

This case was formerly before the Supreme Court, the decree then in force being reversed and the cause remanded (112 Ill. 269), because it failed to require appellee to pay appellant the money paid by him in his purchase, and interest thereon. This error is obviated by the record now before us and the decree is therefore affirmed.

Decree affirmed.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY
COMPANY

V.

GREGOR MAY.

Railroads — Negligence — Personal Injuries — Crossings — Signals, Failure to Make — Flagman, Absence of — Contributory Negligence — Evidence — Instructions.

1. In an action to recover from a railroad company damages for personal injuries alleged to have been occasioned through its negligence at a street crossing, this court holds as erroneous certain instructions given in behalf of the plaintiff, upon the ground that they stated no rule to govern the jury in assessing damages, and that the statement repeated in each of them that the same must not exceed a certain sum, was improper, as being likely to influence a verdict therefor.

2. This court condemns the use by counsel in jury trials of extravagant and intemperate language, calculated to arouse the prejudice and passion of jurors and lead to unjust results.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Mr. PLINY B. SMITH, for appellant.

Mr. S. M. MEEK, for appellee.

MORAN, J. This action was brought to recover damages for injuries received by appellee by reason of a collision between appellant's engine and a team which appellee was driving. The accident occurred on the evening of November 19, 1884, at the crossing of appellant's tracks and West 55th street boulevard. There were various grounds of negligence alleged against appellant in the management of the engine and train which struck appellee, and in the failure to properly guard the crossing by signals or gates or the presence of a flagman; and the appellant on its part charged and strenuously insists that appellee did not exercise ordinary care for his own safety, and was injured by reason of his own negligence. The evidence on the issues of negligence by appellant and want of ordinary care by appellee is conflicting, and it is by no means clear how the verdict ought to be. Yet, probably, a reviewing court would not disturb the verdict if there were no misleading or erroneous instructions.

The case, however, is one calling for accurate, clear and perspicuous instructions on all material issues which were submitted to the jury for determination, and under the well established rule must be reversed if we find that misleading instructions were given by which the court can see that the jury may have been influenced to the injury of the appellant. *Volk v. Roche*, 70 Ill. 297; *Cushman v. Cogswell*, 86 Ill. 62; *Wabash Ry. Co. v. Henks*, 91 Ill. 406; *C., B. & Q. R. R. Co. v. Warner*, 108 Ill. 564.

Among other instructions given to the jury by the court at the request of appellee were the following:

"4. The court instructs the jury that, under the laws of the State of Illinois, no railroad corporation is permitted to run upon its railroad any train of cars moved by steam power, for the transportation of passengers, unless there is placed upon the train one trusty and skillful brakeman for every two cars in the train, or unless the brakes are efficiently operated by power applied from the locomotive; and, if they believe from the evidence that this train which struck the plaintiff in this case had not on it any such brakeman, and that the injury complained of would not have occurred had there been there-

on a trusty and skillful brakeman, and if the jury believe from the evidence that the plaintiff used reasonable care to avoid the accident, then you should find the defendant guilty, and assess damages in behalf of plaintiff at whatever sum you think just and proper under the evidence and instructions in this case, not exceeding the sum of \$5,000.

5. The court instructs the jury that though they may believe from the evidence in this case that the plaintiff was in some slight degree negligent, yet if you believe the negligence of the defendant was gross in comparison with that of the plaintiff, then you should find the defendant guilty, and assess the damages in favor of the plaintiff at whatever sum you think just and proper under the evidence, not exceeding the sum of \$5,000, having reference to the other instructions in this case as to the measure of damages.

6. The court instructs the jury that if they believe from the evidence in this case, and under the instructions of the court, that the defendant is guilty of wrongful acts, neglect or default, as charged in the plaintiff's declaration, and that the same resulted in the injury of Gregor May, then the plaintiff is entitled to recover in this case such damages as the jury may deem from the evidence and proofs that the plaintiff has sustained, if any, up to the commencement of this suit; such damages as will compensate the plaintiff for his personal injury so received, and for his loss of time, in endeavoring to be cured, and his expenses necessarily incurred, if such loss of time, expense and personal injury have been proved, and you are at liberty also to take into account any pain and suffering undergone by him up to the time of bringing this action, if any such have been proven, in estimating damages in this case, in all not to exceed \$5,000."

The instructions numbered four and five above set out authorize the giving of damages in terms that have been frequently condemned. They state no rule to govern the jury in assessing damages. This court said of an instruction similar to those: "It does not confine the plaintiff's right of recovery for all his losses and expenses, whether necessary or otherwise. * * * Moreover, the jury were told that the

plaintiff was entitled to recover for any injuries he had sustained, leaving the jury to include any elements of damages they might think proper." *McGinnis v. Berven*, 16 Ill. App. 354.

True, the said instructions refer to other instructions in the case as to the measure of damages, and if any proper instruction had been given clearly limiting the jury to the true elements of damage the error in them might be cured; but the only other instruction relating to damages given is number six above set out, and that is subject to just criticism. It declares that the plaintiff is entitled to recover "such damages as the jury may deem from the evidence and proofs that plaintiff has sustained, if any, up to the commencement of this suit;" what follows in the instruction is an enumeration of certain elements of damage, but the terms are neither in form and effect a limitation of the jury in those elements of damage named, and the result is that the jury are left at large and free to include such grounds of damage as they might think proper.

There is a further objection to said instructions. All of them contain the significant suggestion to the jury that the damages to be awarded are not to exceed the sum of \$5,000. The verdict is for just \$5,000. The instruction number six does limit the damages to those sustained up to the commencement of this suit, and therefore we must conclude that damages for any permanent injury, which in cases like the present usually constitute the most important basis for allowing damages, were not estimated by the jury in reaching the verdict. The conclusion is almost irresistible that the "damnable iteration" of the phrase "five thousand dollars" in all the instructions relating to damages had the effect of inducing the jury to fix on just that sum.

The Supreme Court has said of an instruction of similar import: "By all the rules of philology, that is but telling the jury they must render a verdict for \$5,000. It is true the jury did not render such a verdict, but was it not a strong persuasive argument addressed to them by the court to render a large verdict?" *C., R. I. & P. R. R. Co. v. Austin*, 69 Ill. 426.

There are other errors assigned, but as they will probably not be repeated on another trial we do not deem it necessary to enter upon a discussion of them. We will merely say as to one of them, that it would be well for counsel in their addresses to juries, especially in that class of cases in which it is well understood that their clients have the ready sympathy of the jury, to confine their discussion to the evidence in the particular case, and avoid intemperate and extravagant statements of matters not pertinent and which are calculated to arouse the prejudice and passion of jurors and lead to unjust results. The judgment will be reversed and the case remanded.

Reversed and remanded.

CONRAD FOLZ

V.

JACOB NELKE.

Banks—Insolvency of—Stockholders—Liability of, to Depositors—Res Adjudicata.

1. In an action brought by a depositor of an insolvent bank against one of its stockholders, who, under its charter, was liable for its debts to the extent of his stock, this court declines to interfere with the judgment for the plaintiff.

2. A decree in a given cause governs only the parties thereto.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. ADAMS & HAMILTON, for appellant.

Messrs. BLUM & BLUM, for appellee.

Per Curiam. Appellant, who was a stockholder to the extent of \$3,000 in the German Savings Bank of Chicago,

Gray v. Lindauer.

was sued by appellee to recover the balance due the latter from the bank, as shown by the pass book of appellee, in which his deposits in the bank were entered. The charter of the bank makes the stockholders individually liable for the debts of the bank to amount of their stock.

Appellant sets up the statute of limitations of five years, but as the question is precisely that determined in *Shalucky v. Field*, 124 Ill. 617, we are not at liberty to depart from that ruling, which is adverse to appellant.

The only other defense relied on, was a decree and certain other proceedings in a suit in chancery, to which appellant was a party, and which resulted in the payment by him of a small portion of his stock liability for the benefit of the creditors of the bank. Appellee was not a party to that suit, and received no benefit whatever from the decree therein, and the established rule that a decree binds no one who is not a party to it, must be applied here. The judgment is affirmed.

Judgment affirmed.

MOSES W. GRAY ET AL.

V.

BENJAMIN LINDAUER ET AL.

Fraud—Interest—Procuring of Debtor in Failing Circumstances to Purchase Goods from Another—Special Finding—Evidence.

A creditor who advises his debtor to purchase goods, with the object of deriving the benefit therefrom, is not liable to the seller thereof if the debtor purchases with honest intent.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. MILLARD & SMITH, for appellants.

Mr. B. M. SHAFFNER, for appellees.

GARY, J. This is an action on the case. Several counts are for alleged fraud by appellants, in representing one Armstrong to be worthy of credit.

In answer to a special question, the jury have found that there was no special fraud or deceit in the representation. The last count of the declaration is, in substance, that the appellants, having chattel mortgages on the property of Armstrong, who was insolvent, and intending to defraud the appellees, induced and procured Armstrong to buy on credit, goods from the appellees, with the intent on their part, of converting them to their own use by means of the mortgages, and that the scheme was successful.

The count is very long, and is a verbose attempt to plead the evidence, which, if the appellees' view of the law be correct, would sustain a count in trover. The count is to be taken most strongly against the pleader. This is a familiar rule. *People v. Swigart*, 107 Ill. 494. "In the proceedings of any court, where an accusation is preferred, the minimum of allegation is the maximum required in proof." Deuman, C. J., 5 Ad. & E. N. S. 995, *Francis v. Steward*. The count contains no allegation of anything done by the appellants to deceive the appellees, or of any collusion with Armstrong, or that he did not buy with an honest intention and expectation to pay for the goods.

It comes to this: can an action be maintained by one who sells on credit to an insolvent, struggling honestly but unsuccessfully to retrieve his fortunes, against a third person who expects by the exercise of his power over the insolvent, to get the benefit of the purchase, and for the purpose of realizing that expectation, persuades the insolvent to purchase, and succeeds in his expectation, and the vendor remains unpaid?

There is no precedent for such an action. Where there has been fraud by the purchaser, participated in by the defendant, the latter has been held liable. *Hill v. Perrott*, 3 Taun. 274; *Biddle v. Levy*, 1 Stark. N. P. 20; *Irving v. Motly*, 7 Bing. 543. But no case holds that where the purchaser bought in good faith, and therefore acquired an indefeasible title, a third person could be held liable for the price the pur-

chaser was unable to pay, on the ground that such third person, from whatever motive, had given the purchaser unwise advice for him to follow, and the adviser had derived a profit from it. The fact that there is no precedent for such an action is a strong though not conclusive argument against it. See *Smith v. Hurd*, 12 Metc. 371; *Cunningham v. Brown*, 18 Vt. 123; *Rockingham v. Boshier*, 39 Me. 253; *Conn. Mut. v. N. Y. & N. H.*, 25 Conn. 265.

It is quite needless to review the evidence. If there had been the ordinary count in trover in the declaration, and no answer by the jury to any special question in the way, whether the evidence would support a verdict for the appellees, is not now a subject of inquiry; but the answers to the special question being, in effect, such as confine the verdict to the last count, and that being insufficient, the court might perhaps have been technically justified under the statute in entering judgment for the appellants. The statute, however, is not imperative, but at the least, the appellants were entitled to a new trial. Many other questions in the case are left untouched. The judgment must be reversed and the cause remanded.

Reversed and remanded.

AARON B. MEAD AND ALBERT L. COE

v.

JOHN P. ALTGELD.

83	373
136	298
33	373
43	380

Agency—Sales—Real Property—Deposit on Contract for Purchase—Recovery of—Unsatisfactory Title—Evidence—Experts.

1. The construction of a written agreement is for the court.
2. The personal undertaking of a real estate agent to return a sum received by him as a payment, in case the title to certain property of his principal under contract of sale should be shown to be defective, is not inconsistent with the character of agent.
3. A purchaser of real estate should receive a title good beyond a reasonable doubt.
4. The sufficiency of a title is a question of law for the court and in con-

trroversies involving the same, the opinions of lawyers as experts should not be considered.

5. Errors which do no harm can not be complained of.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. A. N. WATERMAN, Judge, presiding.

Messrs. McCLELLAN, CUMMINS & MOULTON, for appellants.

The evidence shows that the contract for the sale of the land was between Mrs. Ray and Mr. Altgeld; that Mead & Coe, the appellants, acted only as her agents in making the sale, and that the money was paid to them as her agents. That contract defined the rights of the parties to it. An agent who has acted in good faith in a transaction upon which money has been paid to him on account of his principal, can not be liable in a suit to recover back the money. *Ewell on Agency*, p. 419, top paging, marginal p. 312 and following pages; *Shepherd et al. v. Underwood*, 55 Ill. 475, where the English cases on this point are cited and commented on and the above doctrine deduced; see pp. 480-1.

In *Bamford v. Schuttletworth*, 11 Adolphus & Ellis, 926, it is noted that the money had been paid over in that case, but the decision was not put upon that ground, one of the judges remarking that it was immaterial whether it had been paid over or not, the others putting it upon the ground that there was no privity of contract between the vendee and the agent.

Stephens v. Badcock, 23 E. C. L. 160, is also commented on and approved by the court, which seems to have been an action against an attorney's clerk for moneys collected and receipted for in the name of the attorney and the action of the client against the clerk held not to lie.

In *Sadler v. Evans*, 4 Burrongs, 1934, Lord Mansfield sustains the doctrine that the action ought to be brought against the principal, unless in special cases.

In *Colvin v. Holbrook*, 2 Comstock, 126, the conclusion

seems to have been arrived at that an agent receiving money for his principal in pursuance of a valid authority, without fraud, duress or mistake, is not liable in an action on behalf of the person who is ultimately entitled to the money, for neglecting to pay the same upon request and before it is paid over to the principal.

In *Costigan v. Newland*, 12 Barb. 456, the same principle is recognized, and it is said the case of *Colvin v. Holbrook* must be regarded as settling the law in that State.

It is laid down in 1 *Parsons on Contracts*, 79, that where money is paid to one as agent, to which another as principal has color of right, the right of the principal can not be tried in an action brought by the party paying the money, against the agent, as for money had and received, for the use of such party, but such action should be brought against the principal. See also *King v. Hurd*, 2 Ill. App. 212; *Warder v. White*, 14 Ill. App. 50.

The above doctrine is stated in *Ewell on Agency*, top paging 421, marginal paging 313, as follows:

"Where money has been paid to an agent, the courts have declined to allow an action to proceed against the agent for the purpose of trying the validity of the right claimed by the principal," and the authorities are there cited, criticised and examined in the following pages and the above doctrine fully sustained. On page 423, top paging, marginal p. 315, it is stated:

"Where an action is brought against an agent, but on the ground that the payment was made by mistake, or for the purpose of testing a right claimed by the principal, the action will not lie." On page 426, top paging, marginal p. 318, it is stated:

"Want of privity between the agent and principal parties has often proved fatal to the right of the latter to recover money from the agent."

The court erred in admitting in evidence on behalf of the appellee the opinions of certain attorneys and counselors at law, as shown by the record, that the title of Mrs. Ray was not a good and marketable title.

Whether the evidence on the part of the appellee proved the title of Mrs. Ray to be not good, which was the case the appellee was bound to make out to entitle him to recover, was a pure question of law.

The latest case we find on the subject is *Murray v. Ellis*, 112 Pa. St. Rep. 485, S. C., 3 Atlan. Rep. 845. That case was an action to recover money paid under an agreement for the purchase of real estate where the buyer rejected the title as not good and marketable. The court says, as to the opinion of counsel in relation to the soundness of the title, "The court properly rejected the opinion of William Gorman, Esq., as to the marketable character of the title, for that was a question for the determination of the court on the papers and other facts submitted to it, and the opinion of a witness, however learned, could avail nothing."

In *Canfield v. Gilbert*, 4 Esp. 221, being an action to recover money deposited on purchase of real estate, Gibbs, of counsel for plaintiff, put it to Lord Ellenborough as to the plaintiff's right to recover, that the opinion of different conveyancers had been taken on the title, who were of opinion the title was defective and ought not to be taken by the plaintiff, and asked whether it might not be sufficient for him to rely on the fact of such conveyancers advising the plaintiff not to complete the purchase, or whether it was necessary for the plaintiff to go into the title and show it was defective. Lord Ellenborough held it was necessary for the plaintiff to show the title was bad.

The case came on for hearing at the Easter term, 1803, on verdict for the plaintiff, subject to the opinion of the court (see 3 East, 516) where the question of title was considered as a pure question of law. See also *Brooks v. Clark*, 1 Swanst. 551.

Alpass v. Watkins, 8 T. R. 516. Action to recover back deposit money. The court considered the question of title as a question of law.

Wild v. Foote, 4 Taunt. 334, is to the same effect.

In *Mabberley v. Robbins*, 5 Taunt. 625 (an action at law), the court passed on the title.

Mead & Coe v. Altgeld.

In *Boehm v. Wood*, 1 *Jacobs & Walker*, 419, the court says: "The doubts of conveyancers, whether the title is good or bad, amount to nothing."

"A scientific person called as a witness is not entitled to give his opinion on the merits of the case." *Jamison v. Dunkald*, 12 *Moore*, 158.

"A witness can not be called and give his testimony on a mere probability." 2 *Best on Evidence*, Note to Sec. 513, p. 873, citing *People v. Rogers*, 13 *Abb. N. S.* 370; *Moorehouse v. Matthews*, 2 *Comst.* 514.

Nor unless opinion relates to matters of skill. *Best on Evidence, supra*; citing numerous cases.

But must be based on all the evidence. *Best on Ev.* 874.

For reasons for limiting introduction of expert evidence. see 2 *Best on Evidence*, Sec. 511.

A witness can not be asked what would have been his conduct. 2 *Best on Evidence*, p. 880; *Greenleaf on Evidence*, Sec. 441.

Messrs. BRANDT & HOFFMAN, for appellee.

The first point made by counsel is that this action will not lie against appellants but should have been brought, if at all, against *Julia M. Ray*. To sustain this proposition they cite *Shepherd v. Underwood*, 55 *Ill.* 475, which holds directly the contrary. They also cite several other cases, nearly all of which are taken from the opinion in the case above named. Not one of the cases cited by counsel to this point tend to support the position assumed by them, and they serve no purpose in this case except to fill the pages of an argument.

In *Story on Agency*, Sec. 269, the following occurs: "In the next place, a person contracting as agent will be personally liable, whether he is known to be an agent or not, in all cases where he makes the contract in his own name, or voluntarily incurs a personal responsibility, either express or implied." The text of this section then goes on to give many instances of the liability of an agent when he contracts in his own name, and cites scores of cases showing that appellants are liable in this case, if any one is. The terms of the contract signed by appellants expressly declare that if the title proves

to be not good, the \$1,000 "will be refunded *by us*," appellants, to appellee. The money was paid to appellants, and the contract expressly bound them to return it. That appellants are liable under this contract, if appellee is entitled to recover this \$1,000 at all, is a proposition too elementary to receive or justify discussion.

Appellee testified that he refused to pay the \$1,000 to appellants till they agreed to bind themselves personally to return the money if the title was not good. The court received this evidence but held that he did not consider it as in any way modifying or altering the terms of the contract. By the terms of the contract appellants bound themselves explicitly to return the money if the title was not good.

MORAN, J. This action was brought by appellee to recover from appellants money which he had deposited with them for which they delivered to him a receipt as follows:

"CHICAGO, March 29, 1886.

"Received from John P. Altgeld, one thousand dollars, first payment on contract for purchase of lots 4, 5, 6 and 7 in the Superior Court partition of the S. $\frac{1}{4}$ of B. 23 in C. T. Sub. of the W. $\frac{1}{2}$, W. $\frac{1}{2}$, N. E. $\frac{1}{4}$, Sec. 17, 39, 14. It is understood and agreed that in case the title proves to be not good, this one thousand dollars will be refunded by us to Mr. Altgeld.

"\$1,000.

MEAD & COE, Agents,

"Per Wentworth."

At the same time this paper was executed a contract for the purchase of these lots was made between appellee and one Julia M. Ray for \$30,000. Appellants were the agents of Mrs. Ray, and delivered to appellee an abstract of title of the premises, which was examined by appellee's attorney, who pronounced the title shown thereby to said lots not good in said Julia M. Ray. Appellee returned the abstract to appellants and showed them the opinion of his attorney, Gen. G. W. Smith, thereon, and declined to take the land unless he was given a merchantable title thereto. Appellee demanded from appellants the money mentioned in the said receipt, and though no steps were taken to perfect the title by either

appellants or their principal, they refused to return the money to appellee. Thereupon this action was brought and was tried before the judge without a jury, and a finding and judgment rendered in favor of appellee.

Appellants' first contention is that the contract between Julia M. Ray and appellee and the receipt given by appellants are to be construed together; that appellee knew appellants were acting as agents for Mrs. Ray in receiving and receipting for the money, and that it was received, in fact, under the contract between appellee and said Mrs. Ray, and that appellants are not liable personally on said receipt. It is for the court to construe the receipt, which is in writing, and it is very clear that in form the appellants personally undertake to refund the \$1,000, in case the title should prove to be not good. Such a personal undertaking is not inconsistent with the character of agent, and it is well settled that where an agent expressly charges himself personally, he will be so held whether he is known to be an agent or not. *Mechem on Agency*, Sec. 558; *Story on Agency*, Sec. 269.

Whether appellants would be liable if they merely received the money for their principal and gave no personal promise to pay it back, need not be here considered. Appellants are liable on the express terms of the receipt executed by them personally to appellee. Appellants contend that it is not shown by the evidence that the title was not good.

Secondary evidence of the contents of the abstract furnished by appellants to appellee was introduced (a proper foundation having been laid for the introduction thereof) from which it appeared that block 23, in which the lots purchased by the appellee were situated, was conveyed November 18, 1851, by deed from the canal trustees to S. Lockwood Brown and *James Matterson*.

In 1854 Brown brought a partition suit against the canal trustees and the heirs of *Joseph Matterson*. The bill alleged that the canal deed should have run to *Joseph Matterson* as the real purchaser. A decree was entered in this partition suit which declared that the deed was made by mistake to

James Matterson, that Joseph Matterson was the real purchaser of the property, and directing that the canal trustees should convey to the heirs of Joseph Matterson one-half of the block, and divided the block by assigning the north one-half to Brown, and the south half to the heirs of Joseph Matterson. The abstract further showed that in 1866 the canal trustees made a deed whereby, after reciting that in 1851 they had conveyed to Brown and James Matterson, they, in pursuance to the decree of the court in the partition suit, convey the north half of said block 23 to Brown, and the south half to the heirs of Joseph Matterson.

Afterward there was a partition suit between the heirs of Joseph Matterson, by which the lots in question were assigned to Julia Matterson, now Mrs. Ray. The objection to the title arises from the fact that neither James Matterson, if there was such a person, nor his unknown heirs, were made parties to the partition suit, and that no conveyance was made from S. Lockwood Brown to the heirs of Joseph Matterson. If in fact, Joseph Matterson paid for one-half the property, his heirs should be entitled to have a deed made to them by Brown; for if *James* Matterson was not in existence, Brown took the entire legal title by the deed from the canal trustees. *Davy v. Kemp*, *Bridgman R.* 384; *Overton v. Lacy*, 6 T. B. Monroe, 13; *Freeman on Co-tenancy and Part. Sec.* 28. If there was such a person as James Matterson, the legal title to one-half the block vested in him, and the decree in the partition suit did not affect that title, as neither he nor his heirs were made parties.

We are of opinion that the title was not good. The rule of law is that "a purchaser who bargained for a good title shall not be compelled to take one which is subject to suspicion. This does not mean that the title shall be good beyond a possible peradventure, for then he might never be satisfied; but it must be free from reasonable doubt. It must be a title to which no reasonable man would object; such a one as a prudent man would not hesitate to invest his own money upon, at a full market price; such a one as will bring in the market as high a price with as without the ob-

J. W. Middleton Co. v. Roycroft.

jection." *Brown v. Cannon*, 5 Gilm. 174; *Parker v. Porter*, 11 Ill. App. 602; *Cravenor v. Hale*, 27 Ill. App. 275, and *Parmlee v. Head*, 33 Ill. App. 134. No prudent man would be willing to take the title offered and pay full price for it. It was for Mrs. Ray or her agents to clear up the doubt and remove the suspicion, and they have taken no steps to do so.

Appellants' last contention is that the court erred in admitting the opinions of lawyers as experts, to show that the title as shown by the abstract was not a marketable one.

This position of appellants is correct. The sufficiency of the title was a question of law, and it was not competent to prove what were the opinions of lawyers or conveyancers. *Parmlee v. Head*, 33 Ill. App. 134; *Murray v. Ellis*, 112 Pa. St. 485; *Canfield v. Gilbert*, 4 Esp. 221; *Alpass v. Watkins*, 8 T. R. 516.

But while this was error, it was error that did not injure appellants. If the facts relating to the title had not been stated to the court, and the judge had nothing to rely on but the opinions of said lawyers, the judgment would have been reversed for the admission of such evidence. But the facts appear in the record. The contents of the abstract showing the title was proved to the court, and the judgment of law rendered on said facts is correct, as we have already seen. It is only injurious error which will reverse.

The objections of appellants can not be sustained, and the judgment of the Circuit Court must therefore be affirmed.

Judgment affirmed.

J. W. MIDDLETON COMPANY

V.

GEORGE W. ROYCROFT, ADMINISTRATOR.

Master and Servant—Negligence of Master—Minor Servant—Personal Injury—Unguarded Elevator Shaft—Rules and Regulations—Signals—Evidence—Order "to hurry."

In an action by an administrator to recover for the death of his intestate, the same being alleged to have been occasioned through the negligence of his employers, this court declines, in view of the evidence, to interfere with the verdict in behalf of the plaintiff.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

MR. FREDERICK A. SMITH, for appellant.

MR. JOSEPH S. KENNARD, JR., for appellee.

GARY, J. The appellee is the father and administrator of Joseph J. Roycroft, who was a boy under sixteen years of age, employed by the appellants in their stationery, printing and binding establishment, and was killed while so employed February 17, 1887, by falling about sixty feet down an elevator shaft in the premises of the appellants. The deceased had been at work for the appellants ten days.

From the evidence in the case, it was admissible for the jury to find that the appellants had no person in charge of the elevator; the shaft was dark; the doors to the shaft opened by swinging on hinges from it, and could be opened from the outside by lifting a common latch; the deceased was sent by a superior servant of appellants up to the third floor with a form of type, and told to hurry right down to go on another errand; he was assisted by that servant in getting the form upon the elevator; when he reached the third floor, he left the elevator, shut the door, carried the form about sixteen to eighteen feet, left it, and at once returned to the elevator, opened the door and stepped off into the pit and was killed; that in that short absence another servant of the appellants, contrary to the regulations as to signals in relation to using the elevator, had, without warning, taken it upon another floor, so that when the deceased came back to the shaft, and stepped off in the darkness, the platform upon which he had stood but a few seconds before, was gone, and the signals

which ought to have preceded its departure had not been given. There was testimony that the attention of appellants had been, before the accident, called to the darkness of the shaft and the want of guards to it, by the city inspector of elevators. As to none of these circumstances except the degree of light in the shaft, and the neglect to signal before moving the elevator, was there any conflict of evidence, and as to the latter, if the time the deceased was absent from the elevator was stated truly, the regulation signal could not have been given. And if the jury from the evidence did believe that the facts were as recited, it was inevitable that they should find for the appellee, because of the extremely dangerous character of this elevator and its surroundings. The negligence of the appellants was deliberate; that of the deceased, the result of the inexperience of youth, acting under the command requiring on his part haste, and without notice that the peril which he had no reason to anticipate, had, in the few seconds he was absent, come in his way.

In such a case a jury, to whom belong all questions of care and negligence, absolute, relative or comparative, will not be affected by testimony that he had been instructed how to use the elevator, or that his father had previous knowledge that he was using it, or that there were rules of the establishment habitually disregarded by everybody, that the elevator should not be used by persons going down without burdens. On the part of the appellee no instructions were given; some modifications of those presented by the appellants were excepted to, and were assigned as error, but the argument by appellants is upon the facts, and there was nothing harmful to the appellants in any of the modifications, so that it is unnecessary to review them.

The principles which govern this case have been often recognized in this State, and in the text books. Ill. Cent. v. Welch, 52 Ill. 183; C. & N. W. v. Jackson, 55 Ill. 492; C., B. & Q. v. Gregory, 58 Ill. 272; Shear. & Red. on Neg., Sec. 213. The judgment will be affirmed.

Judgment affirmed.

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GEORGE S. POPPERS

V.

JOSEPH H. PETERSON.

Trover—Possession—Title—Demand—Evidence—Parties.

1. In an action of trover, the plaintiff must have, at the time of the conversion, as against the defendant, a right of property in the chattel converted and the possession thereof, and must prove that while the right of possession was in him, he made a demand therefor.

2. In an action to recover the value of certain furniture and jewelry, this court holds, in view of the evidence, that the judgment in behalf of the plaintiff can not stand.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. KIRK HAWES, Judge, presiding.

Messrs. L. D. THOMAN and J. J. PARKER, for appellant.

Mr. J. MCKENZIE CLELAND, for appellee.

GARNETT, P. J. Appellee sued appellant in trover to recover the value of certain furniture and jewelry, which, as alleged in the declaration, was the property of appellee and was wrongfully converted by the appellant to his own use.

The evidence, which in many particulars is very vague and unsatisfactory, we think tended to prove these facts: that about October 25, 1885, appellee borrowed \$1,000 of appellant, giving several promissory notes to evidence the indebtedness, and as security therefor delivered to appellant the jewelry in question, a mortgage on appellee's household furniture, and certain other securities which need not be particularly described as they are not involved in this litigation.

About August 5, 1886, there being then \$500 unpaid on the debt, appellee told appellant that he was in some financial trouble, and the latter replied that if he would let him have

his folding beds and fixtures, he would pay him the difference and give him his property back. We assume, but perhaps without sufficient foundation, that this blindly stated transaction meant that appellant was to have the beds and fixtures as security for the debt, in place of the jewelry, and was to pay appellee the difference between the debt and the value of the beds and fixtures, and was also to surrender to him the jewelry. Whether that is what the parties meant, we are not prepared to say; but appellee placed that construction on the arrangement, and he then permitted appellant to take the folding beds, and called at appellee's place of business, where the latter laid the jewelry on the counter with the remaining unpaid note of appellee, and producing another paper which appellee supposed to be a receipt for the jewelry, directed appellee to sign it, and he did sign it as requested.

Appellant then took the jewelry and the paper so signed, and put them into his safe, and appellee took the note. When the jewelry was put back into appellant's safe, appellee asked him what that was for, and was told by appellant that his creditors might make trouble; that it was all right, and appellee could get it anyway.

In this arrangement appellee at the time acquiesced, but afterward became dissatisfied and went, as he testified, several times to appellant about "this property" and that appellant refused to turn it over to him. The paper so signed by appellee on August 5th was in fact an acknowledgment of the receipt of \$1,000 from appellant on the beds and jewelry. It also appears from appellee's evidence that at some time (but he does not state when) he sold the jewelry in question to one O'Hara, and after that he went with O'Hara and demanded of appellant that he should deliver the same to O'Hara, but appellant refused to do so, and that O'Hara then canceled the sale and surrendered to appellee all his interest therein.

The burden of proving this cause of action was on appellant. In an action of trover the plaintiff must have, at the time of the conversion, as against the defendant, a right of property in the chattel converted, and the actual possession thereof (*Blain v. Foster*, p. 297, this volume), and he must

prove that while the right of possession was in him he made demand for the property on the defendant. Cooley on Torts, 530.

Whether the sale to O'Hara was made before or after the first demand made upon appellant, is a point upon which this record gives no light whatever. If it was before any demand, the injury, if any, was suffered by O'Hara alone, and the action should have been brought by him. If it was after demand appellee should have made some proof tending to show that fact, but we find none such in the case.

If the cause of action vested in O'Hara, no transfer thereof could enable appellee to bring suit at law in his own name, whatever may be the rule in equity. As there is no pretense of any demand by appellee after O'Hara reconveyed the jewelry, we are not required to speculate upon the question of law which would be presented if such a demand had been made.

From the views here presented, it is obvious that the judgment should be reversed and the cause remanded.

Reversed and remanded.

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HUBERT BREIER, EXECUTOR,

v.

NICHOLAS WEIER.

Administration—Gift in Præsentī—Evidence.

1. The holder of a note duly indorsed, is legally presumed to be the owner thereof.

2. In an action involving the question as to whether a certain note was delivered by a mother to her son as a gift *in præsentī*, this court, in view of the evidence, declines to interfere with a decree in the affirmative.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. D. BLACKMAN, for appellant.

Mr. J. McKENZIE CLELAND, for appellee.

GARY, J. May 24, 1886, one Joseph Frank made his promissory note to Catherine Breier, the then wife of the appellant, of whose will he is executor, for \$880, payable one year after date with six per cent interest.

The appellant and his wife had been living with Frank for a short time before the note was made, but immediately thereafter went to the house of their son Sebastian, and lived with him a year or more. The old couple had had some trouble with each other, and within a few weeks of their removal to the house of Sebastian she made her will, a Mr. Warner writing it for her, under her instructions.

It is clear that then she desired that her other sons should have her real estate, and that Sebastian should have all her personal property. She then signed an indorsement of this note to Sebastian and by stipulations between the parties, the only question in the case is whether it was then delivered to him as a gift *in presenti*. There is a great mass of confused testimony from ignorant witnesses, much of it mere neighborhood gossip, but whatever uncertainty there is as to many particulars, it is quite clear that the testatrix then intended that Sebastian should, either at once have the note as his own property, or the avails of it at her death. It is not probable, in view of the evidence, that to her mind there was any such distinction. Whether the note was then delivered to him, or taken from her possession by fraud, is the subject of conflicting evidence. The latter hypothesis involves a crime. The legal presumption of innocence is against it. 1 Taylor on Ev. 133. Being in his possession under an indorsement to him Sebastian is presumed to be the owner of the note. Farwell v. Meyer, 35 Ill. 40; Burnap v. Cook, 30 Ill. 168. These cases show that if the indorsement was in blank, the presumption would be the same. It would be useless to collate at length the mass of testimony for the mere purpose of showing that, as a result, it can not be fairly said that the Circuit Court arrived at a wrong conclusion from it. The decree must be affirmed.

Decree affirmed.

CHICAGO & WESTERN INDIANA RAILROAD COMPANY
v.
JOHN THOMLINSON ET AL.

Sales—Contract—Stone for Depot—Extras—Evidence—Burden of Proof—Instructions—Agency.

In an action brought to recover a sum claimed to be due for certain stone furnished, it being alleged that the same was not included in a given contract, this court holds that the burden of proof was upon the plaintiff to establish his claim, and that the trial court erred in instructing the jury that the same was upon the defendants to show that the stone in question was furnished under the contract.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Messrs. OSBORN & LYNDE, for appellant.

Mr. ALLAN C. STORY, for appellees.

GARY, J. The appellees, by contract with the appellant, furnished the cut stone for the passenger depot of the appellant, at Polk street. The contract was for the stone "agreeable to drawings and specifications bearing even date herewith, drawn and prepared by Cyrus L. W. Eidlitz, architect, and signed by the contracting parties." "Signed by contracting parties" is ambiguous. "Contracting parties" is synonymous with "contractors," and if this word had been used, the common understanding would have been that only the appellees were to sign.

There was a drawing stamped with the name, profession and address of the architect, and signed by the appellees, showing the tower of the depot, the cut stone for which is now claimed as extra. The testimony agrees that that draw-

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ing was signed by the appellees in New York some weeks later than it bears date, but there is a dispute whether the appellees had had an opportunity to take into account the stone shown by it, in making their calculations, and whether they were misled, by mistake or design of the architect, to suppose that they had figured upon the stone shown by it. When the time for furnishing that stone came the appellees claimed that it would be extra. The appellants denied it.

Without going into detail, it may be said that the most favorable aspect of the case for the appellees is, that they were entitled to go to the jury upon the questions whether the architect was so far agent of the appellant that, if he misled the appellees, the appellant was chargeable with the consequences; whether, in fact, he did mislead them, and whether, if the appellees were not bound under their contract to furnish the stone in question, there was any request, express or implied, by the appellant to the appellees to furnish it.

And upon all these questions the burden of proof would be upon the appellees, with certainly a good deal of doubt as to their success. Now, upon this state of the case, the court instructed the jury that the burden of proof was upon the appellants to show that the stone was furnished under the contract.

For this error the judgment is reversed, without going over the many questions made by the parties.

Reversed and remanded.

WILLIAM BORDEN

V.

CATHARINE M. CROAK, ADMINISTRATRIX.

Landlord and Tenant—Lease—Condition—Lien for Rent—Death of Tenant—Claim by Landlord against Estate of—Administration—Widow's Award—Term "Property"—Equitable Lien.

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59	388
33	389
61	557

1. The term property means that which is susceptible of present possession or enjoyment; that which is to be acquired is not property.

2. A condition in a lease, providing that the lessor shall have a valid and first lien upon the property of the lessor for rent, refers to property owned at the time of the making thereof. To reach subsequently acquired property the instrument must identify the same; failing to do so it is void for uncertainty.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. WILSON & MOORE, for appellant.

The contract in the lease for a lien was a valid and binding contract.

Mr. Borden's claim for a first lien upon the assets of this estate is based *solely* on the contract entered into by Thomas F. Croak in his lifetime. The contract was concise and comprehensive. The lessor was given "a right of distress, and also a valid and first lien for said rent, accruing and to accrue upon the property of the person or persons liable therefor." It is not disputed that the lease was made; it is not disputed that the property upon which the lien is claimed was the property of Croak, or that he was liable for the rent; but it is claimed that the contract is not valid, or such an one as the parties could competently make. This question has been before the Supreme Court in two recent cases. In the case of Webster v. Nichols, 104 Ill. 160, a similar contract was in question. The clause in the lease provided that the rent should be a first lien on all the buildings placed on the demised premises, and upon all the property of the lessee, and the parties were endeavoring to enforce the lien by a bill in the nature of a foreclosure. The court granted the relief, and said, in the course of its opinion: "It seems to be the clear result of all the authorities, that whenever the parties by their contract intend to create a positive lien or charge, either upon real or personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title

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thereto, against the latter." And on page 179 the court said that it was competent for the parties to contract for the lien, and that the lien was valid as against the lessee and his assignee. In the case of the Illinois Starch Co. v. Ottawa Hydraulic Co., 17 N. E. Reporter, 486, the contract was the same. The rent was to be "a lien upon the said tract of land, hereby leased, and all the improvements thereon, or which may be put upon the same, which shall include machinery of every kind used upon said premises." The bill was to enforce the lien upon the buildings and machinery by a strict foreclosure of the mortgage clause, and the relief was granted. In both of these cases the exact question at issue, and decided by the court, was the validity of a contract between a lessor and lessee, for a lien for rent, upon the personal property of the lessee. That such contracts, therefore, are valid between the parties, is the well settled law of this State.

The lien given by the contract is enforceable against the representatives of Croak's estate, against his widow, and against claim creditors.

The administratrix of Croak's estate stands in his place. She is a mere volunteer, and takes the property of the deceased subject to all equities and claims that existed against it in the hands of the deceased. Webster v. Nichols, *supra*, 176; Sumner v. McKee, 89 Ill. 127-132.

In the case at bar she took the property, subject to Borden's lien, for rent due and to accrue. If Croak, in his lifetime, had sold the property to a *bona fide* purchaser, the lien would have attached to the proceeds of the sale, for he could not defeat his own contract by his own acts. Accordingly, when the court, for convenience in distribution and for the benefit of the estate, ordered a sale of the personal property, the proceeds came into the hands of the administratrix, representing, to all intents and purposes, the property sold. They were subject to the same lien. The administratrix, by her acts, could defeat it no more than her intestate.

Messrs. YOUNG & MAKEEL, for appellee.

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GARNETT, P. J. William Borden leased to Thomas F. Croak, during his lifetime, a store in Borden Block, Chicago. The written lease provided that the lessor should have a valid and first lien for the rent, accruing and to accrue, upon the property of the person or persons liable therefor, and the rent was made payable monthly, in advance. Croak died June 3, 1886, two months' rent being then due and unpaid. He was a merchant tailor, and kept upon the premises a stock of merchandise, used in his business, a large part of which was there when he died.

By agreement with the administratrix of the estate, Borden leased the premises in September following to another tenant, claiming at the time that he waived none of his rights under the original lease. In November, 1886, he filed his claim in the Probate Court against Croak's estate, for the June and July rent (waiving his claim for all subsequent rent), and petitioned the court that the rent for those two months should be declared a first lien upon the assets in the hands of the administratrix. The assets were not sufficient to pay the widow's award, and the contest is therefore between her and the lessor. It is admitted that the alleged lien is based solely upon the stipulation in the lease. The generality of the terms supposed to create the lien, can not escape notice. No property in particular is described, nor is the locality given. If we follow the construction contended for by appellant, a secret lien was created on all property, of every description, then owned or thereafter acquired, in any quarter of the globe, by the lessee.

It seems scarcely necessary to say that so broad a scope should not be given to the words of the lease, if it can be avoided without violence to the manifest intention of the parties. The word "property" refers, in an abstract sense, to ownership, title, estate, right, and, in a concrete sense, to the thing itself, which is owned. Anderson's Dictionary of Law, 835. If no terms are used conducting the mind to future acquisitions, the word "property" refers to present ownership only.

In common acceptance "property" means that which is

susceptible of present possession or enjoyment. That which is to be acquired is not property. The means by which its acquisition is anticipated, a contract for example, may vest a present valuable right, but can not, with any regard for the properties of language, be considered as the thing to be obtained. The word is never used to indicate a mere hope, or expectation of having property. No rational man thinks he has property merely because he lives in expectation of having some. If the intention of the parties was that the security should extend to subsequently acquired property, that intention ought to have been clearly expressed. *Tapfield v. Hillman*, 6 Man. & Gr. 245.

We think the fair interpretation of the clause in the lease is, that it was intended to operate only on the property then owned by the lessee, and as the record fails to disclose that any of the assets (consisting of a stock in trade) which come into the hands of the administratrix, were owned by him when the lease was made, the case of appellant was not made out. *Hamilton v. Rogers*, 8 Md. 301. But if this conclusion is not correct there is another reason why the alleged lien can not be sustained. In any view of the matter appellant's lien is of an equitable, not of a legal character.

The property upon which appellant is asking for the enforcement of a lien must be regarded as after-acquired property, and if he can reach any property, his right to do so is subject to this limitation, the instrument creating the lien must identify the property. *Bispham's Principles of Equity*, 217; *Jones on Chattel Mortgages*, Sec. 172 a; *Morrill v. Noyes*, 58 Md. 458.

If it is not identified, it is void for uncertainty. In *Tadman v. D'Epineu*, 20 Ch. D. 758, it was held that an instrument purporting to charge "all my present and future personalty" to secure an indebtedness, created a lien on the personal property owned by the debtor at the time the instrument was executed, but was inoperative as to property he afterward acquired, because of the absence of identification.

In *Belding v. Reed*, 3 Hurl. & Colt. 955, the deed conveyed certain specified personal property, with a general clause

added for the conveyance of all the grantor's other personal property upon or about his house, farm or premises, at Reedham or elsewhere, in the kingdom of Great Britain, and it was decided that so far as the general clause was concerned, the conveyance was a nullity. The same rule is recognized in *Lazarus v. Andrade*, 5 Com. Pl. Div. 318, and it is there considered a material point, in such cases, that neither the character of the property nor its whereabouts is indicated, and there is nothing to ear-mark it.

The principle of these authorities we believe to be sound and not in conflict with *Webster v. Nichols*, 104 Ill. 160, and *Sumner v. McKee*, 89 Ill. 127. The order of the Circuit Court is affirmed.

Order affirmed.

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MARY J. ILLINGWORTH

v.

CATHARINE BURLEY.

Landlord and Tenant—Recovery of Rent—Married Woman—Family Expense—Sec. 15, Chap. 68, R. S.

The rent of a house occupied as a residence is a family expense within the meaning of Sec. 15, Chap. 68, R. S.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. RUFUS KING, for appellant.

Messrs. CLIFFORD & SMITH, for appellee.

MORAN, J. This action was brought to recover from appellee the rent of a house in which she lived with her hus-

band. The house was rented by the husband about the 1st of August, 1885, and it was occupied by appellee with her said husband till the date of his death, which occurred August 22, 1886. Appellee continued to reside in the house for a month after her husband's death, and for that month she paid the rent, but refused to pay for the time during which her husband was living. The trial court held her not liable. The question is, whether rent of a house occupied by the family is a family expense within the meaning of Sec. 15, Chap. 68, R. S.

This section of our statute is taken from the code of Iowa, and the construction given it by the courts of that State has come to us within the statute.

Food, clothing, medicine, household and kitchen furniture, a piano, an organ, a lady's watch and chain, all have been held to be within the statute, when such articles were shown to be provided for and actually used in the family. This court has held that a physician's bill for services rendered to the husband in his illness, at his request, was a family expense, for which his wife was liable. *Wolcott v. Hoffman*, 30 Ill. App. 77. And the same was held by the Appellate Court of the Third District in the case of *Cole v. Bentley*, 26 Ill. App. 260.

It would seem that a house to live in is about as essential to the existence and maintenance of the family as household furniture or cooking utensils, and that rent for the use of such a house might very fairly be regarded as an expense of the family. If any distinction exists between the fees of a physician to treat, the price of the medicine to administer to, and the rent of a building to shelter the family, it has not been pointed out, and we have failed to perceive it.

We think the rent sued for was an expense of the family, and that appellee is liable therefor under the provisions of the statute cited, and for the error in denying appellant judgment for the amount of said rent the case must be reversed and remanded for a new trial.

Reversed and remanded.

CONRAD C. LENZ ET AL.
v.
CHICAGO LUMBER COMPANY.

Contracts—Carriage of Lumber—Breach—Evidence—Separate Judgments.

In an action brought for the recovery of damages for the alleged failure of the defendants to perform a certain contract touching the carriage of lumber, this court, in view of the evidence and of the fact that no material errors were committed by the trial court, declines to interfere with the verdict for the plaintiff.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. SCHUYLER & KREMER, for appellants.

Messrs. PAYNE & PORTER, for appellee.

Per Curiam. This action was brought by appellee to recover damages from appellants for a failure to perform certain contracts for carrying lumber from Muskegon, Michigan, to Chicago, during the season of 1886. One of the alleged contracts was in writing and one was verbal. The court directed the jury to allow no damages for any alleged breach of the latter contract, so the controversy, so far as it related to such contract, is eliminated from the case. There was a verdict and a judgment against appellants for damages, for breach of the written contract, and on this appeal various errors are assigned and urged for the reversal of said judgment.

A large number of witnesses were examined upon the trial and many issues of fact made, and we deem it unnecessary to go into a detailed statement of the facts, or a discussion of

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the various points of law raised by counsel for appellants. We have fully considered all the questions in the case, and we are satisfied that the evidence fully supports the verdict of the jury on every material issue; that no error was committed by the court in the admission or exclusion of evidence, and none in the giving, refusing or modifying instructions, which were, in any respect, materially injurious to appellants or either of them.

The action of the court was correct in refusing to enter a separate judgment against each defendant. The act of Congress on which appellants rely as requiring such separate judgment, has, in our opinion, no application to a case like the one presented by this record.

The judgment of the Circuit Court is fully authorized by the law and the evidence, and no error having intervened on the trial which requires that we should set aside such judgment, the same will be affirmed.

Judgment affirmed.

ADDISON J. TRUNKEY ET AL.

V.

ERIC L. HEDSTROM ET AL.

Sales—Quantity of Coal—Failure to Deliver—Damages—Evidence—Stenographer's Transcript—Introduction of, upon Subsequent Trial—Stipulation—Death of Witness.

1. In the absence of a statutory provision, the rule is that a deposition given by a witness at a time when he was not disqualified, may be read in chancery, or on the trial at law of an issue out of chancery, if he acquires an interest in the suit after giving the same.

2. A stenographer's transcript of the evidence of a party plaintiff to a given suit is inadmissible upon a subsequent trial thereof, the agent of the defendant with whom the contract in question was entered into having died in the meantime.

3. In an action for the recovery of damages alleged to have arisen through the failure of defendants to deliver a quantity of coal contracted for, this court declines, there being no evidence tending to prove that the plaintiffs were ready to pay for the same, to interfere with the judgment against them.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. PERRY A. HULL, for appellants.

Mr. FREDERIC ULLMANN, for appellees.

GARNETT, P. J. This is a suit in assumpsit, by appellants against appellees, to recover damages for failing to deliver 7,500 tons of coal, which appellants allege they purchased of appellees in 1880. The contract was made between Addison J. Trunkey and Horatio L. Pratt, agent of appellees.

On the first trial of the case, in April, 1886, both Trunkey and Pratt testified, the evidence being preserved in shorthand by a stenographer, who made a transcript of their testimony. The jury having disagreed and the cause coming on for trial again, it was stipulated that the transcript of Pratt's testimony might be read in evidence by the defense, if it saw fit, on the second or any subsequent trial of the case. The verdict, on the second trial, was set aside, and a new trial granted. Afterward, and before the third trial, Pratt died. Trunkey thus being rendered an incompetent witness, the plaintiff, on the third trial sought the benefit of his evidence, given on the first trial, by offering so much of the transcript thereof as tended to prove the conversations between Trunkey and Pratt in reference to the contract, and made the requisite proof of the correctness thereof, but the trial court ruled the same incompetent, to which appellants duly excepted. The evidence thus excluded was material to the plaintiff's cause of action, and was not supplied by any other proof.

In the absence of statutory provision the rule seems to be that a deposition, given by a witness at a time when he was not disqualified, may be read in chancery, or on the trial at law of an issue out of chancery, if he acquires an interest in the suit after giving his deposition. And Greenleaf in his work on Evidence, Vol. 1, Sec. 168, says: "In other trials at

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law no express authority has been found for reading the deposition, and it has been said that the course of practice is otherwise; but no reason is given, and the analogies of the law are altogether in favor of admitting the evidence. And as it is hardly possible to conceive a reason for the admission of prior testimony, given in one form, which does not apply to the same testimony given in any other form, it would seem clearly to result, that where the witness is subsequently rendered incompetent, by interest lawfully acquired in good faith, evidence might be given of what he formerly testified orally, in the same manner as if he were dead." The case referred to, however, is that of a witness who was wholly disinterested when his evidence was first given, and therefore supposed to be entirely without bias or prejudice. The author does not tell us what the rule would be, when a statute like that in force in this State has been enacted, providing for the admission of the parties to the suit as competent witnesses. By the first section of our statute it is declared that no person shall be disqualified as a witness in any civil action, by reason of his interest in the event thereof; by the second, that no party to any civil action shall be allowed to testify therein of his own motion when any adverse party sues or defends as executor, administrator, heir, legatee or devisee of any deceased person, except in certain specified cases; by the fourth, that a party to the suit, who has contracted with an agent of the adverse party, the agent having since died, shall not be a competent witness as to any conversation or transaction between himself and such agent, except where the conditions are such that under the provisions of the act he would have been permitted to testify if the deceased person had been a principal and not an agent. The intention of the Legislature is hereby plainly expressed, and the courts can not add to what has been enacted without exceeding their judicial functions.

If Pratt had been the principal in the contract he made with appellants, his death would have disqualified Trunkey as a witness, as the facts do not bring the case within any of the specified exceptions to section 2. Nor is there anything in the

statute authorizing the admission of proof of the testimony formerly given by Trunkey. It declares the cases in which he may be a competent witness, but has nothing to say as to when his testimony, given on a former trial, is admissible, thus leaving the question as it was at common law. Taylor v. Bunker, 36 N. W. Rep. 66.

Appellants claim that although they were prevented by the exclusion of the transcript of Trunkey's evidence from proving the contract price for the coal, yet they are entitled to recover, because they did prove by another witness the quantity of the coal contracted for, and the value thereof at the time of the contract, and at the time and place of the delivery. Conceding that the proof was sufficient on these points, the cause of action was not made out without showing appellants' readiness to pay. Hough v. Rawson, 17 Ill. 588; Funk v. Hough, 29 Ill. 145; Kitzinger v. Sanborn, 70 Ill. 147.

The amount required to pay for the coal in question was about \$40,000, but there was no evidence given tending to prove that plaintiffs were ready to pay that or any other sum.

The judgment is affirmed.

Judgment affirmed.

POSTAL TELEGRAPH-CABLE COMPANY

V.

CHARLES D. LATHROP AND LUTHER C. MARLEY.

Telegraph Companies—Messages—Errors in the Transmission of—Damages—Options—Trading in—Evidence—Instructions—Special Agents—Authority of.

1. No neglect by a special agent to do a thing touching which he has not been instructed by his principal, will charge the latter.

2. In the absence of evidence tending to show that an error in a telegram did not occur through natural causes, the presumption will be that the same arose from the negligence of the company.

3. If a message delivered is in cipher, an unintelligible jumble of words having no meaning in themselves, a company is not responsible for the damages resulting from an error in its transmission, however clear the meaning might be to one having the key.

Postal Telegraph Cable Co. v. Lathrop.

4. If a message on its face appears to relate to a business transaction, involving the purchase and sale of property, the company has notice thereby that it is important, and is liable for the actual damages resulting from an error in its transmission, through its negligence.

5. In an action brought to recover from a telegraph company for damages alleged to have arisen through errors in the transmission of certain dispatches, this court, in view of the evidence, declines to interfere with the verdict for the plaintiffs.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. JAMES L. HIGH, for appellant.

Messrs. DEXTER, HERRICK & ALLEN, for appellees.

GARY, J. This was an action by the appellees against the appellants for damages sustained in consequence of errors in the transmission of dispatches from appellees, in Chicago, to their agents in New York.

The course of business was that the appellees instructed, by telegraph, their agents in New York to buy or sell, for future delivery, coffee, which orders the agents executed by making, in their own names, on the coffee exchange in New York, such contracts as the orders required. The agents gave the appellees no information as to the parties with whom the contracts were made, nor were such parties informed of the interest of appellees. The orders had reference to but one grade of coffee, and were numerous, both to buy and sell. When an order either way had been followed by a corresponding one the other, the execution of the latter, as between the appellees and their agents, canceled both. The agents credited or charged to the appellees the profit or loss upon both, and between themselves there was nothing left but a balance, that went into their accounts with each other. The appellees received no coffee, delivered no coffee, on any of the purchases or sales of this character.

The agents in New York in their dealings with parties

there, did, when the time for performance came, if the contracts had not been set off, one against another, and the difference settled, as was usually the case, receive or deliver coffee as their contracts required; but with that performance the appellees had nothing to do, and of it they were wholly ignorant.

The argument by the appellants now is, that as this was the uniform course of business, it must be presumed that the appellees and their agents intended, when orders were sent and received, that whatever might be done in execution of them should be done according to that course of business, and there seems no reason to dispute that conclusion; and from it they insist that such a course of business is merely gambling in legal effect, and that no cause of action can grow out of anything done or committed in it. It must be borne in mind that the orders were to be executed in New York. The statute of this State, if applicable to such a state of facts, does not govern, and no statute of New York is put in evidence. If any law makes the business illegal it is the common law, which is presumed to be in force in New York. *Crouch v. Hall*, 15 Ill. 263.

There is nothing in the case to indicate that actual purchase and sales were not intended; nothing indicating an intention to settle contracts at maturity or any other time, by receiving or paying the difference between the contract and the market price. The course of business contemplated buying cheap and selling dear, and where a line could be drawn that would make transactions of that character illegal, and not invalidate legitimate business, no court has attempted to say. Such dealings are sustained as legal in England—*Ashton v. Dakin*, 4 H. & N. 867; in Kentucky—*Sawyer v. Taggart*, 14 Bush. 727; and provoked no censure from the Court of Appeals of New York in *Cameron v. Durkheim*, 55 N. Y. 425.

In the cases in this State—*Pickering v. Cease*, 79 Ill. 328; *Lyon v. Culbertson*, 83 Ill. 33; *Pearce v. Foote*, 113 Ill. 228; *Cothran v. Ellis*, 125 Ill. 496, and perhaps some others, the Supreme Court have not settled the facts upon which they animadverted, as they appear in this record.

The appellants assign as error that they were not permitted to prove an offer of the use of their line to the New York agents for the purpose of rectifying errors in the dispatches, and also that the court refused to instruct the jury that if the New York agents discovered the error in time to make a sale, without loss, of what they had bought under the erroneous dispatches, the appellees could not recover the loss. They treat these two assignments as involving the same principle. The answer is that the New York agents were in no sense, as shown by the record, general agents of the appellees, but acting in each step of the business under special instructions; and the only discretion permitted to them was in buying or selling within limits fixed by the instructions. No neglect by them to do what they had no instructions from appellees to do, would charge appellees.

The question of general and permanent interest in the case is on the measure of damages. If the appellants could have that settled as they desire, they might easily consent to let the rest of the case go by default.

The dispatches in the course of which the errors occurred, are as follows: "Please buy one thousand August." "Please buy in addition two thousand August, one thousand cheapest month." "Put stop order on five thousand December at seventy cents. This order good until countermanded." The word "two" in the second dispatch should have been "to," and "seventy cents" in the last should have been "seventeen cents," and were so in the originals delivered to the appellants. Now, as there is nothing in the dispatches showing to what they relate, or from which their importance can be ascertained, and as the appellants had no notice that they were important, they insist that they are only liable to refund, with interest, what they received for their transmission. Experts on both sides testified as to their opinion, whether the errors could have been caused by storms, etc. The appellants complain that they were not permitted to prove, by their witnesses, instances when errors had been so caused. The fact that the witnesses were experts did not make proof of the instances any more competent than it would have been

from witnesses called for the single purpose of proving them. Such proof would have multiplied the issues, as each instance might have been the subject of conflicting testimony as to the particular circumstances of that instance.

Whether the errors occurred from causes beyond the control of the appellants, was left to the jury, with the instruction that if the jury found no evidence to the contrary, the law presumes they were caused by want of ordinary care on the part of the appellants. With this instruction appellants find no fault, as indeed they could not, the law being so settled in the first telegraph case in this State—Tyler v. W. U. Tel. Co., 60 Ill. 421.

The cases generally agree that if the message delivered is in cipher, an unintelligible jumble of words, having no meaning in themselves, the company is not responsible for the damages resulting from an error in its transmission, however clear the meaning may be to one having a key. W. U. Tel. Co. v. Martin, 9 Ill. App. 587, where many cases are cited, is an example of this class. On the contrary, if the message on its face appears to relate to a business transaction involving the purchase and sale of property, the current of authority is that thereby the company has notice that it is important, and is liable for the actual damages resulting from an error in its transmission, through negligence of the company. Tyler v. W. U. Tel. Co., 60 Ill. 421; U. S. Tel. Co. v. Wenger, 55 Pa. St. 262; W. U. Tel. Co. v. Harris, 19 Ill. App. 347; Rittenhouse v. Ind. L. Tel. 44 N. Y. 263.

The reason assigned in the last case, that if the agents of the company did not understand the importance of the message they could have inquired, does not seem very convincing, implying, as it does, that they ponder over the meaning of dispatches passing through their hands.

Taking the whole case as this record shows it to be, the only defense for the company was in showing that the error was caused by some extraneous influence over which they had no control; failing in this, they were responsible for the actual loss resulting from their mistake. The judgment must be affirmed without further discussion of details.

Judgment affirmed.

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY
COMPANY

v.

SARAH A. PARKER, EXECUTRIX, ETC.

38 405
54 390
131 567

Railroads—Negligence of—Open Switch—Personal Injuries—Joint Use by Several Roads of the Same Track—Excessive Rate of Speed—Ordinance—Rules and Regulations.

1. A railroad company is estopped, in an action against it to recover for personal injuries alleged to have been occasioned through its negligence, to set up as a defense that its rule as to speed was disobeyed by deceased, in the face of evidence going to show that the rate of speed in question was required by the company.

2. In an action to recover from a railroad company for the death of a locomotive engineer in the employ of another company, alleged to have been occasioned through the negligence of the servants of the former company in leaving a switch open, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. PLINY B. SMITH, for appellant.

There are few cases in the books involving accidents of this kind, thus indicating either that a disregard of signals by railroad employes is exceedingly rare, or else that injuries received as the result of such disregard are by common consent regarded as without remedy.

The duty to watch for signals has been carried so far that the Supreme Court of Michigan recently decided, that if a traveler upon the highway drove upon a railway crossing in disregard of the sign-board giving notice of the track, he is guilty of such negligence as to preclude recovery for an injury received from a collision upon the crossing. *Potter v. F. & P. M. R. R. Co.*, 28 N. W. Rep. 714.

Chief Justice Campbell, in delivering the opinion, says: "The sign-board was in plain sight for a long distance, and admonished them that there was a crossing before them. If they didn't see it they were in fault for not doing so. No plainer warning can be devised, and no reason is given, nor is it imaginable why they didn't stop, or in any way act upon it."

* * * * *

"If men do not choose to heed what they ought to heed, they must bear the consequences. It is the duty of all highway travelers to keep a due lookout. There may be some conflict upon other points, but upon the plaintiff's gross negligence there is no conflict."

In *Morse v. Duncan* (U. S. Cir. Court, S. D. Miss.), 8 Am. & E. R. R. Cases, 374, it is held that it is the duty of an engineer to watch for a signal, and stop at a flag station, and if the train does not stop on such signal the person so prevented from taking the train at that point may recover damages.

In *Lombard v. C., R. I. & P. R. R. Co.*, 47 Iowa, 494, it was held that where a handcar overtook and collided with another handcar going in the same direction upon the same track, that the employes upon the former handcar were guilty of negligence in not observing and obeying the signals to stop given by those upon the latter.

In the case of *C. & N. W. Ry. Co. v. Snyder*, 117 Ill. 376, which arose out of a collision between a train on the track of the C. & N. W. Ry. Co. and a train on the track of the C., M. & St. P. Co., on account of a misunderstanding concerning the signal by which the passage of trains on both roads over the crossing was regulated, the C., M. & St. P. Ry. Co. asked an instruction to the effect that if the semaphore signal was given to its train to proceed, and make the crossing, and was not given to the train of the C. & N. W. Ry. Co., the jury should find for the C., M. & St. P. Ry. Co. This instruction was refused. It was contended on the trial that the signal man gave the proper signal to the train on the St. Paul road to cross, and that the engineer on the Northwestern train negligently failed to observe such signal, and undertook to make the crossing in disregard of it.

The court in its opinion say: "There was evidence introduced on the trial tending to prove that after the west-bound train on the Northwestern road had crossed, the semaphore signal was then given to the St. Paul train to proceed, and that the train under the control of Snyder had no right then to move, and under the pleadings and evidence we see no reason why the instruction was not proper."

The signal being displayed that the switch was wrong, nothing can excuse Parker for running through it. It was claimed, however, that the switch was obscured by smoke and steam from the engine, so that it was hidden from Parker's view, and that this fact relieved him from the duty to regard it.

Parker was guilty of gross negligence, if the signal which it was his duty to watch for and obey was obscured from sight, for running past the switch at a reckless and dangerous rate of speed, and not putting his train under control until he should ascertain its condition.

He was running under circumstances of peculiar danger; he was beyond the reach of telegraphic orders, "feeling his way along," running on his own responsibility. Numerous switches led from the main track; his train was behind time, and the switch and main track were likely to be in use; he was approaching, if not the most, one of the most dangerous points between Chicago and Englewood—a switch almost constantly in use, where one or more engines were continually at work, passing back and forth across the main track.

Under these circumstances of more than ordinary danger, instead of running with more than ordinary care, he increased the speed of his train, and was running to make up time.

When he approached the switch an engine and train were working upon the side track, so close to the switch that it was enveloped by the smoke and steam of the engine. This was a suspicious circumstance; one calculated to make an engineer observe special care. Knowing that this engine worked there constantly, crossing and recrossing the main track and using the switch, it would suggest at once that the switch had been recently open.

The signal on the switch would indicate its position, but the plaintiff claims that it was obscured from view by steam and smoke. Under these highly dangerous circumstances, this fact did not prompt Parker to any exercise of care, but on the contrary, he maintained his high rate of speed, and plunged into the cloud of steam and smoke without having a care or thought as to the result.

Approaching, as he was, one of the most dangerous points on the road, a switch constantly in use, with the suspicious circumstance that the engine was working close by it—knowing that there was a signal on the switch which should always indicate its position, but which was now momentarily concealed from view—the plainest dictate of prudence should have prompted him to slacken the speed of his train and put it under control until he could have seen the position of the signal which was constantly displayed for his information. But instead of taking this precaution he dashed along, with his train under such speed that it was beyond his control, and if any of the numerous switches leading out of the track should be wrong, no power could save him from destruction. He was drawing a train load of passengers, whose lives and whose safety were dependent upon his care and skill. His heedlessness would subject them to the peril of their lives, or fearful injury. And yet, with this responsibility, he dashed along with his train beyond control, with the train-load of passengers depending only upon the chances of the track being clear, and the switches in position.

It has been decided in numerous cases that a high rate of speed upon a dangerous track was such negligence on the part of the engineer as to render the railway company liable to third persons injured in consequence, and such contributory negligence as would prevent a recovery by the engineer himself, if injured. *I. C. R. R. Co. v. Patterson*, 69 Ill. 650; Same case, 93 Ill. 290; *I. C. R. R. Co. v. Jewell*, 46 Ill. 99; *C., R. I. & P. R. R. Co. v. McAra*, 52 Ill. 296; *Sweeney v. M. & St. L. Ry. Co.*, 33 Minn. 153; *Mantel v. C., M. & St. P. Ry. Co.*, 33 Minn. 62; *N. C. R. R. Co. v. Messino*, 1 Sneed (Tenn.), 220.

Messrs. JOHN MCGAFFEY and JOHN T. RICHARDS, for appellee.

GARY, J. This was an action by the appellee under the statute, for damages for the death of John C. Parker. He was a locomotive engineer, employed by the Rock Island Company, who used, jointly with the appellants, the tracks between Chicago and Englewood, a distance of between six and seven miles. November 7, 1883, he was bringing a train of eleven cars into Chicago, and at about 4:30 p. m., being two hours late, his locomotive ran through an open switch, which led to a side track of the appellants, to which a locomotive of the appellants had passed, leaving the switch open.

This locomotive was standing on this side track, and there was evidence that smoke and steam from it obscured the target of the switch so that the deceased could not see the target, nor could he see that the rails of the switch were misplaced until too late to stop, and the result was a collision in which he was killed. He was running, as the jury have found in answer to a question, at the rate of fourteen to eighteen miles an hour, and the ordinance of the town of Lake, where the accident occurred, prohibited a speed exceeding twelve miles an hour. There was evidence that the two companies had a joint time table between Chicago and Englewood, but it was not put in evidence, the appellants objecting to its admission, but from the testimony the time allowed to make the distance seems to have been from twenty to twenty-eight minutes.

The appellants put in evidence joint rules of the companies printed on that time card as follows:

"1. *Passenger trains must not be delayed.* Engineers and conductors of freight trains, and men in charge of yard trains, must not pull out on main track in advance of a passenger train due or in sight; and, in the event of their occupation of the main track, when passenger trains are delayed, must, on the appearance of passenger train, run to the nearest siding, or, if necessary, cross over to the other main track, properly protecting their trains in all cases.

2. Inasmuch as trains are liable, at all hours, to be entering the yards or sidings at reduced speed, engineers and conductors running trains or engines between Chicago and Englewood, when the view is from any cause obscured, *must so control their trains or engines as to be able to stop within the range of their vision.* But nothing in this will be held as an excuse for the failure to display proper signals, when trains or engines are held on the main track, and men in charge of trains or engines, when in danger of being overtaken by another train, must protect themselves by flags, lamps and torpedoes, promptly, to avoid all possibility of being run into.

3. Delayed trains, between Englewood and Chicago, must run with great caution, and at all times under full control.

4. Conductors will supply themselves with the time tables of the C., M. & St. P. Ry. and with joint time card of L. S. & M. S. and C., R. I. & P. trains, between Chicago and Englewood. Also with bridge time table, between Rock Island and Davenport.

5. All trains will approach stations with reduced speed and with care.

6. On approaching bridges, switches and passing road crossings, the greatest care must be taken.

7. A strict and faithful observance of foregoing regulations, it is believed, will enable the conductors to so govern their trains as to avoid danger or accident, as far as circumstances can be foreseen and avoided. It is therefore vastly important that, when understood, they be observed and enforced. It is earnestly hoped that this notice is all that may be necessary to insure a prompt and willing obedience to rules, as the consequences, whether good or bad, must, in a great measure, rest upon those who have the immediate charge of the trains."

The argument of the appellants in this court is all upon facts; either as to what the jury should have done, or what instructions the court should have given as to acts or omissions constituting negligence on the part of the deceased. That argument consists of two parts: First, that the deceased was violating an ordinance as to speed, and therefore there could be no recovery; second, that he was violating the foregoing rules, with the same consequence.

As the appellants kept the time table out of the case, the jury were justified in taking the time at the shortest testified to by any witness; but if the longest was taken, then twenty-eight minutes for six miles and a half, with three stops to make, required a speed not less than the jury found that the train was going.

Shall the appellants, by rules, require the speed, and then object that obedience to the rule was negligence? It is difficult to discuss such a question without using language inappropriate to a judicial deliverance. The defendants are estopped by their own conduct.

The deceased came to his death not by any act of his own which would have contributed to it, if the appellants had not violated their own rules, but by a peril which they put in his way, and of which he had no warning. If, in compliance with the first of the above rules, the appellants had properly protected their locomotive on the side track, the switch would have been in place, and Parker in safety. If he knew that rule, and saw the locomotive standing there, the presence of the locomotive was to him a representation by the appellants, that the switch was in place for the main track; whether the smoke from the locomotive obscuring the target ought to have caused him to doubt the truth of that representation and slow up, was a question for the jury, to which the answer would always, and ought to be, adverse to the appellants; and besides, the record shows that there were a great many switches between Chicago and Englewood; it does not show that the deceased, or any other engineer, would remember the location of each target. The presence on the side track, of the locomotive, was no indication of the place at which the switch was, that connected the main and side tracks; and if the deceased did not remember that a target stood where the smoke then was, he would not naturally expect to find one under the cover of that smoke.

It is not the duty of this court to go over a multitude of instructions and answer arguments as to each, when upon a special question the jury have found that the target was obscured by smoke, and that smoke came from a locomotive

of the appellants, the mere presence of which was a representation that the target, if it could be seen, showed the main line to be open. The judgment must be affirmed.

Judgment affirmed.

JUDGE GARNETT takes no part in this decision.

CHICAGO, EVANSTON & LAKE SUPERIOR RAILWAY
COMPANY

v.

SIMON ADAMICK, ADMINISTRATOR, ETC.

Railroads—Negligence—Personal Injuries—Crossing—Excessive Damages—Evidence—Instructions.

1. In an action brought by a parent against a railroad company to recover for the death of a minor daughter alleged to have been killed through its negligence, this court holds, in view of the evidence, that the amount of the verdict in his behalf was unwarranted and excessive.

2. In cases of this character instructions touching the assessment of damages should set forth the proper rule to be followed by the jury in arriving at the same.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. EDWIN WALKER, for appellant.

MESSRS. JOSEPH S. KENNARD, JR., and BRANDT & HOFFMAN, for appellee.

MORAN, J. This action was brought to recover for causing the death of Tillie Adamick, the daughter of appellee.

The girl was killed at a street crossing at about seven o'clock on the morning of November 30, 1887, while on the

33	412
51	313
33	412
63	244
33	412
68	629

way to the factory in which she worked, by being struck by a train of freight cars which were being pushed ahead of an engine, and which, it is alleged, were run over the street crossing at great speed, and without warning.

One of the issues made upon the trial was whether the appellant was the company which was in control of the train which struck the deceased, or of the railway on which the injury occurred, and it is contended by the appellant that the evidence greatly preponderates against the finding of the jury on said issue, and it is also contended that the verdict is not warranted by the evidence upon the issues as to the care of deceased and negligence on the part of those in charge of the train. As, in the view we take, the judgment must be reversed on grounds not involving any of said issues, and the case submitted to the consideration of another jury, we shall refrain at this time from any discussion of the evidence bearing upon said points of contention.

The jury assessed the damages at \$5,000, the maximum sum allowed by the statute to be recovered for pecuniary loss by the next of kin. We are of opinion that the damages are not warranted by the evidence in this case.

The proof is that deceased was, at the time of her death, seventeen years and six months old, that she was in good health and was earning from nine to eleven dollars a week in a cigar factory. She lived with her father and mother, and besides them left as her next of kin three sisters, two of whom were married, and a third, a girl of sixteen, and two brothers, one twenty-five years old and one seven. There is no evidence that she contributed anything whatever to the support of her family, or that any member of it, or any of her next of kin, were in any degree dependent upon her. The only facts proved which authorized the allowance of more than nominal damages, were that the deceased was a minor, and left a family entitled by law to her services till she became of age. *Chicago & Alton R. R. Co. v. Shannon*, 43 Ill. 338.

While the damages that are recoverable in this class of cases can not be limited by fixed rules and must be left largely to the sound discretion of the jury, yet the finding of the jury

must have some regard to the facts—must be based on the evidence. The utmost that a widow with a large family of children wholly dependent on the earnings of the husband for support, could recover as pecuniary damages for his death, would be \$5,000, and not that, unless the rate of his prior earnings would warrant it. That can not be said to be equal justice which would fix the pecuniary loss of a father for the death of his daughter, whose earnings he had the right to claim only for six months, at the same sum. True, he might receive benefits from her after she became of age, but they would be only such as duty, affection or gratitude should move her to bestow, and in the absence of all evidence that she gave her earnings to her parent when he was by law entitled to them, there is but small basis for the conclusion that she would contribute largely to him when under no legal obligations. In the case of *Andrews v. Boedecker*, 17 Ill. App. 213, the proof was that a son who was killed was nineteen years and eight months old, a mechanic earning \$1.75 per day, and who, up to his death, gave all his wages to his mother, who, with six brothers, three older and three younger than himself, constituted his next of kin, this court set aside a verdict for \$5,000, as not warranted by the evidence. In *I. C. R. R. Co. v. Welden*, 52 Ill. 290, the next of kin consisted of a widow and minor children who were dependent on the deceased, who was a common laboring man, and was at work when killed, but at what wages there was no proof. The verdict of \$5,000 was set aside by the Supreme Court as not warranted by the proof. The court said: "If some rule is not prescribed by which juries must be governed in such cases, the result will be in all cases a verdict to the extent of the law. The jury have no right to find arbitrarily, that the death of any husband and father results in a pecuniary loss to his widow and next of kin of \$5,000." See also, *C. & N. W. R. R. Co. v. Swett*, 45 Ill. 197; *R. R. I. & St. L. R. R. Co. v. Delaney*, 82 Ill. 193; *I. & St. L. R. R. v. Whalen*, 19 Ill. App. 116.

The verdict in this case was probably induced by the improper instruction given to the jury at the request of the

plaintiff. Instruction No. 2 was as follows: "If the jury believe from the evidence that Lillie Adamick, while in the exercise of ordinary care, and without fault or negligence on her part, was killed by negligence of the defendant, as charged in the declaration, then the jury should find the defendant guilty *and assess the plaintiff's damages.*"

According to what rule should they assess the plaintiff damages? The jury were not informed by any instruction. They were set adrift upon the ocean of sympathetic emotions to which the proof of the crushing out of the life of a bright, handsome girl of seventeen by the cruel wheels of a car, would necessarily give rise in every human bosom.

The affliction of the parents and kindred appealed to them for solace, and it is not unlikely that resentment toward the defendant, the negligence of whose servants, they had found by their verdict, caused the death, influenced their estimate of the damages. But sympathy and pity can not be allowed to form the basis of the verdict in such cases, and punishment of the defendant is not within the contemplation of the statute which authorizes the action. The jury should have been given the rule of damages, and it was error to direct them in general terms to assess damages, without in such a case as this, advising them what elements they should consider in fixing the amount. In *City of Chicago v. Scholten*, 75 Ill. 468, the jury were told to "assess the damages at such a sum as will, in the judgment of the jury, compensate the plaintiff, and, those in whose interests he sues, for the loss of the deceased." The court said: "But the instruction may be liable to just criticism, because of its ambiguity as to the nature of the damages the jury were at liberty to award. It should have contained some words of limitation that would have expressly restricted the damages plaintiff might recover, to the pecuniary injury sustained. No other damages are recoverable under this statute. The court should have added the qualification indicated. In its present form, it stated the rules as to damages recoverable in such actions, too broadly, and may have made the impression damages could be awarded for bereavement, and by way of solace for the affliction suffered."

We think this language of the Supreme Court applicable in condemnation of the instruction given in this case. The judgment will be reversed and the case remanded.

Reversed and remanded.

GARY, J., having tried the case in the court below, takes no part in the determination of the same in this court.

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43 640

THE CHICAGO & WESTERN INDIANA RAILROAD
COMPANY

V.

WILLIAM J. SLEE.

Trespass—Railroad Company—Condemnation—Writ of Possession—Failure to Cover Premises in Question—Evidence—Instructions—Liberum Tenementum—Plea of—Damages—Rental Value—Failure to Re-enter.

In an action of trespass *quare clausum* against a railroad company, it being alleged that certain premises were wrongfully taken possession and made use of by it, this court holds that the defendant fully justified the entry under the plea of *liberum tenementum*, which, by a certain stipulation entered into, was to be considered as pleaded in the case; that whatever rights the plaintiff might have in equity to redeem in no way affected the legal title conveyed by a certain deed, when the matter came in question in an action at law, and that the judgment for the plaintiff for the rental value of the premises from the date of the entry until the commencement of the suit was erroneous, in view of the fact that he did not re-enter the same.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. OSBORN & LYNDE, for appellant.

Messrs. C. H. WILLETT and C. PORTER JOHNSON, for appellee.

MORAN, J. This was an action *quare clausum fregit*

brought by appellee against appellant, and the *locus in quo* was the east thirty feet of lots eleven and twelve in Wilder's north addition to Chicago, described in the declaration by metes and bounds. There was a stipulation that under the plea of the general issue the defendant might introduce any defense to which it was entitled, the same as if specially pleaded. Plaintiff's proof was that the defendant, by its agents, accompanied by a deputy sheriff, entered upon the premises in January, 1881, and tore down fences thereon, and filled up the lots with dirt, and laid a railroad track thereon, and kept possession of the same. To show that defendant had no authority to enter, plaintiff introduced a certain writ of possession, the same which the deputy sheriff had, and which had been issued in a certain condemnation proceeding, and it appeared therefrom that while the writ related to certain other portions of said lots eleven and twelve, it did not authorize any entry upon the premises described in the declaration.

The plaintiff became the owner of the said lots eleven and twelve in 1868, and on June 4, 1870, conveyed the same, including the part thereof described in the declaration, by trust deed to Levi D. Boone, trustee, to secure a note for \$4,500, payable three years after date with interest payable semi-annually.

On February 19, 1879, Levi D. Boone, trustee, executed and delivered to the Union Mutual Life Insurance Company of Maine, a deed conveying the said premises; said deed recites the execution of the foregoing trust deed by plaintiff to secure said note, default in payment of the same, demand by the insurance company, the holder of said note, for sale of the premises described in said trust deed, and advertisement and sale to said insurance company; on February 18, 1880, said insurance company executed and delivered to Albert J. Averill a deed conveying the same premises. The above mentioned deeds were introduced in evidence by the appellant, and it was shown by the proof that Averill purchased the property and took the title for appellant, and that appellant directed its agents with Averill's assent to take possession of the property; and during the summer of 1880,

and until the date of the trespass complained of, there was strife between appellee and appellant about the possession of the *locus in quo*, appellant endeavoring to get complete possession of the property described in the deed, and appellee retaining possession, in part at least, so that there was a continual controversy as to who was in possession until January, 1881.

Among other instructions asked by the defendant to be given to the jury was the following: "The jury are instructed in this case to return a verdict for the defendant." This instruction should, in our opinion, have been given. Appellee's counsel says in his brief that he admits that Averill was the agent of the railroad company in holding the title, and treats Averill's title the same as though the conveyance had been direct to the railroad. This being so, the defendant fully justified the entry under the plea of *liberum tenementum*, which by the stipulation is to be considered as pleaded in the case. There was no evidence whatever in conflict with the evidence which was admitted as though said plea was on file; said evidence being documentary, and no issue as to its truth, there was nothing for the jury to pass on, and the verdict could only be for the defendant. Proof which will support the plea of *liberum tenementum* is a complete defense to trespass *quare clausum*. *Fort Dearborn Lodge v. Klein*, 115 Ill. 177; *Brooks v. O'Boyle*, 27 Ill. App. 384.

Appellee's counsel seems to hold the view that because it was declared by the Supreme Court in the *Union Mutual Insurance Company et al. v. Slee*, 123 Ill. 57, in a chancery proceeding, that the deed from the insurance company operated as an equitable assignment of the mortgage, and that Slee had a right to redeem, that fact in some manner affected the legal title conveyed by said deed when the matter came in question in an action at law. This is a mistake. Whatever Slee's right may be, in equity to redeem and to have an accounting, until the redemption has taken place and the decree is entered in pursuance of which the legal title is by appropriate methods restored, it can be asserted at law with its full force. This question was early decided in this State. In

Rcece v. Allen, 5 Gilm. 236, in deciding whether the grantee of a trustee was bound to show that the conditions of the trust deed had been complied with, our Supreme Court said: "This precise question was decided by the Supreme Court of Appeal of Virginia, in the case of Taylor v. King, 6 Munf. 358; and also, in Harris v. Harris, Ib. 367. Indeed in the former case the court went further, and decided that the grantee of the trustee should recover in ejectment, although the jury had specially found that the trustee and purchaser were both guilty of a fraud in the transfer. We do not hesitate to agree with the court, that the conveyance passed the legal title to the estate, and that it did not devolve upon the purchaser to show that the trustee in making the sale had complied with the conditions specified in the trust deed. If the grantee took the title in fraud of the rights of any of the parties, a court of chancery, within whose peculiar jurisdiction such questions are, would either set aside the sale, or treat him as trustee, and compel him to perform the trust." This doctrine has been repeatedly approved. See Windett v. Hurlbut, 115 Ill. 403.

Counsel's contention that this legal title is obliterated because, by the transaction between appellant and the insurance company, Slee's mortgage indebtedness was paid, is not tenable. Such may be the effect in equity, but the circumstances relied on had no operation against the legal title.

If appellant had no other defense, this judgment would have to be reversed for the reason that the court allowed the jury to assess damages for the rental value of the premises from the date of the entry by appellant till the commencement of this suit, it being shown that appellant continued in possession and no re-entry was made by appellee. This was error. Smith v. Wunderlich et al., 70 Ill. 426. The judgment must be reversed and the cause remanded.

Reversed and remanded.

GARNETT, J., took no part in the consideration of this case.

THE CHICAGO & WESTERN INDIANA RAILROAD
COMPANY

v.

WILLIAM J. SLEE.

*Trespass—Railroad Company—Wrongful Possession—Continuance of
—Damages.*

In order to entitle the plaintiff in an action of trespass to recover for a continuance in possession after an ouster, there must be an entry on his part.

[Opinion filed July 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon.
ELLIOTT ANTHONY, Judge, presiding.

Messrs. OSBORN & LYNDE, for appellant.

Messrs. C. H. WILLETT and C. PORTER JOHNSON, for appellee.

MORAN, J. This is an action of trespass brought by appellee against appellant to recover for the continuance of the alleged wrongful possession of certain premises.

The record shows that appellee recovered a judgment against the appellant in a prior action for the wrongful entry upon the premises in question; that appellee claims the *locus in quo* as owner in fee, and that appellant has continued in possession since the wrongful entry for which appellee recovered, and that appellee has never regained the possession or re-entered. "The right of the true owner to the use and profits is suspended until he regains possession either by an entry or under a legal judgment." Waterman on Trespass, Sec. 928. In order to entitle the plaintiff to recover for a continuance in possession after an ouster, there must be an entry. *Smith v. Wunderlich*, 70 Ill. 434.

Union Oil Co. v. Maxwell.

The verdict against appellant was not warranted, and the judgment must be reversed and the cause remanded.

Reversed and remanded.

GARNETT, J., took no part in the consideration of this case.

UNION OIL COMPANY

v.

SARAH J. MAXWELL, EXECUTRIX.

Administration—Claim—Guaranty by Deceased of Certain Alleged Indebtedness—Consideration—Assignment—Pleading—Parties—Misnomer—Abatement—Waiver—Sec. 3, Chap. 76, R. S.

Upon an appeal from an order and judgment entered by the Circuit Court, disallowing a claim filed originally in the Probate Court against the estate of a deceased person, this court holds that the guaranty by him and another upon the formation, with others, of a corporation, of the payment to it of certain indebtedness claimed to be due them, the same being contributed by them toward the assets thereof, amounted to a guaranty that the indebtedness existed as well as that payment should be made; that the assignment thereof to the corporation carried in equity all the securities, the guarantors had for its payment; that the original agreement, being under seal, is joint and several under Sec. 3, Chap. 76, R. S., and that defendant was properly proceeded against; that the second agreement given by the said guarantors is competent and sufficient evidence of the transfer of the indebtedness to the corporation and of its equitable right to the performance of the guaranty, or damages in lieu thereof, and that a probate court has jurisdiction of such equity against an estate in the course of administration.

[Opinion filed July 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Mr. JOHN B. SKINNER, for appellant.

This case must be distinguished at the outset from that

class of cases wherein one party becomes a simple guarantor of the payment of the indebtedness of another, and wherein the discharge of the principal operates as a discharge of the guarantor. The class to which the case at bar belongs is one wherein a party, in substance and effect, becomes the guarantor of certain of his own indebtedness, and the fact that he agrees to pay it in a certain way, viz, through the medium of some third person, cuts no particular figure in the construction of his agreement or in arriving at his liability. In this case it is the guarantor (of his own indebtedness) who is primarily liable, and if the creditor fails to receive the amount guaranteed through the channel of the third party, he can still hold the original debtor.

This proposition of law has been passed on by the courts of nearly every State in the Union and there seems to be no dissenting voice as to the general principle. *Darst v. Bates*, 95 Ill. 493; *Runde v. Runde*, 59 Ill. 98; *Meyer v. Hartman*, 72 Ill. 442; *Brown v. Curtis*, 2 Comst. (N. Y.) 225; *Cardell v. McNeil*, 21 N. Y. 336; *Bruce v. Burr*, 67 N. Y. 237; *Milks v. Rich*, 80 N. Y. 269; *Malone v. Keener*, 44 Pa. St. 107; *M. & G. R. R. Co. v. Jones*, 57 Ga. 198; *Dyer v. Gibson*, 16 Wis. 557; *E. M. & R. M. Co. v. Shattuck*, 53 Wis. 455.

In *Darst v. Bates*, *supra*, our Supreme Court in distinguishing between the two classes of guaranties say (at page 512): "It is a general principle, which prevails in all cases under this branch of the statute, that wherever the defendant's promise is, in effect, to pay his own debt, though that of a third person be incidentally guaranteed, it is not necessary that it should be in writing. * * * The assignor owes the assignee and that particular mode of paying him is adopted; he guarantees in substance his own debt."

The same position is taken by our Supreme Court in *Runde v. Runde*, and *Meyer v. Hartman*, *supra*.

Brown v. Curtis, *supra*, was a case in which the payee and holder of a promissory note transferred it to his creditors in exchange for his own note held by such creditor, and guaranteed the payment of the note transferred, although the form of guaranty used, expressed no consideration. The New

York court say, at page 229: "Although in form this is a promise to answer for the debt or default of another, in substance it is an engagement to pay the guarantor's own debt in a particular way. He does not undertake as a mere surety for the maker, but on his own account, and for a consideration which has its root in a transaction entirely distinct from the liability of the maker. The defendant was a debtor to the plaintiff, and gave the note, with the guaranty, to satisfy that debt."

Again (at p. 234): "If he (the guarantor) intends by the payment of the note which he guarantees, to discharge a distinct obligation, one not originally at all connected with or having reference to the note, then he, in effect, contracts for himself, and his undertaking is original and not within the statute, and no consideration need be expressed in the guaranty."

In *Cardell v. McNiel*, *supra*, the plaintiff sold defendant a horse and received as part of the consideration therefor a note of one Cornell, payable in a buggy. The plaintiff, through his duly authorized agent, warranted Cornell to be "good," and that the plaintiff would get the buggy when the note became due. The note turned out to be worthless, and suit was brought against the guarantor. The court say (at p. 340): "It is claimed that the guaranty is void by the statute of frauds. In mere form it was certainly a collateral undertaking, because it was a promise that another person should perform his obligation. But, looking at the substance of the transaction, we see that the defendant paid, in this manner, a part of the price of a horse sold to himself. In a sense merely formal, he agreed to answer for the debt of Cornell. In reality he undertook to pay his own vendor so much of the price of the chattel, unless a third person should make the payment for him and thereby discharge him."

In *Milks v. Rich*, 80 N. Y. 269, the court reviews and follows the cases above quoted from, with several others, and quotes the following, from *Dauber v. Blackney*, 38 Barb. 432: "That whenever the holder of a note against a third person, turns it out in payment of his own debt, or in the payment of

property purchased, or for money received by him from the person to whom he transfers it, and at the same time agrees that the note is good, or will be paid at maturity, or that it will be collected by due process of law against the maker, this is an undertaking, in substance, entirely for his own benefit and advantage, and the contract is valid, although it rests entirely in parol, and is not within the statute of frauds."

In *Malone v. Keener, M. & G. R. R. Co. v. Jones, Dyer v. Gibson, and E. M. & R. M. Co. v. Shattuck*, all cited above, the courts of Pennsylvania, Georgia and Wisconsin are equally strong in the enunciation of this doctrine.

In *Dyer v. Gibson* (at p. 560) the Supreme Court of Wisconsin say: "Decision has multiplied upon decision, with scarce a syllable of conflict, for more than a century, that such a promise is not reached by the statute; and it is now too late for discussion."

Mr. A. B. JENKS, for appellee.

GARY, J. In the months of September and October, 1875, the proper steps were taken for the incorporation of the Maxwell Oil Company, all of the stock being taken by John P. Maxwell, William E. Wheeler, Benjamin V. Page and William Sprague, and in the following year the name was changed to the Union Oil Company.

The appellee is executrix of Maxwell, and the change of name being after his death, one of the objections made to the claim of appellants is, that the change of name is invalid. If that position be true, a matter not examined into, it is only a misnomer of the old corporation, and is matter of abatement, waived by going into evidence upon the merits. *Hoereth v. Franklin Mill Co.*, 30 Ill. 151. The merits of the case can be best shown by the documentary evidence. The first document is as follows:

"Articles of agreement between Joseph P. Maxwell and William E. Wheeler, parties of the first part, and Benjamin V. Page and William Sprague, parties of the second part, witnesseth:

The above parties agree to form a co-partnership for the manufacture and sale of lard oil, machinery oil, lubricating and other oils, tallows, etc., to continue for the term of ten years. And it shall be at the option of either three of the four above mentioned parties to terminate said partnership as much sooner than ten years as they may elect to do so.

The business shall be conducted under the firm name of Maxwell, Wheeler & Co. The parties of the first part shall contribute to the capital stock of the new firm the amount that shall be found, on the 1st of October, 1874, to be invested in their business and belonging to them, and consisting of their good accounts, stock at its market value, and the improvements, buildings, machinery, etc., etc., included in the factory they own on Illinois street, at cost amounting in all to twenty-two thousand seven hundred and ninety-two and seventy-seven one-hundredths dollars (\$22,792.77).

The parties of the second part shall contribute one hundred and fifty (150) feet of land on Erie street, now covered by their oil factory and the factory buildings, machinery and all else contained in said factory that belongs to them (excepting the iron safe) standing on said land, subject to certain mortgages to the Charter Oak Life Insurance Company for thirty thousand dollars (\$30,000) at eight (8) per cent.

The surplus of the value of said contribution shall be estimated at twenty-seven thousand dollars (\$27,000) and the new firm shall assume and pay said mortgage.

The parties of the second part shall also contribute on the first day of October, 1874, the sum of fifty thousand dollars (\$50,000) in cash, making the capital stock of the parties of the second part, seventy-seven thousand dollars (\$77,000).

The amount invested by each party shall draw interest at the rate of ten (10) per cent per annum, which shall be credited to their respective accounts at the close of each year and shall be paid from the profits of the business, and any balance shall be divided in the proportion of six-tenths to the party of the first part and four-tenths to the party of the second part.

This partnership shall commence on the first day of Octo-

ber, 1874. From the first of May, 1874, to the first of October, 1874, the parties of the first part shall occupy the factory, buildings and property of the parties of the second part, paying therefor as rent the interest of the mortgage of \$30,000 to the Charter Oak Life Insurance Company, and insurance on the property, and nothing more. It is further agreed that the parties of the second part shall furnish perfect title to their said factory and land, and deed the same to the new firm, subject to the above named mortgage.

The mortgage above mentioned covers four hundred and fifty (450) feet of the land belonging to the parties of the second part, and in case the said parties of the second part shall sell or dispose of any part of that remaining, and then after deeding the one hundred and fifty (150) feet to the new firm, it is understood and agreed that they may, if necessary to give a title, pay the Charter Oak Insurance Company any part of the mortgage. And for such part as they may pay, they shall receive from the new firm a note at eight (8) per cent interest for that amount to mature at the maturity of said mortgage.

It is mutually agreed by and between said parties that neither of said parties shall draw from said firm and business more than the sum of ten thousand dollars (\$10,000) in the aggregate per year.

It is further mutually agreed that the parties of the first part guarantee to the new firm all the indebtedness due them from the West Virginia Oil and Oil Land Company, and B. S. Compton and the parties of the second part shall not be interested in or liable for any indebtedness contracted by reason of dealings that may have been had with said West Virginia Oil and Oil Land Company and B. S. Compton.

It is further mutually agreed that in case of the death of either of said parties then the said business of said firm shall continue until the end of the fiscal year, at which time a settlement of his interest shall be made.

It is further mutually agreed that the parties of the first part shall, till the close of this partnership, devote their entire time and attention to the business of the firm. In witness

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whereof we have hereto set our hands and seals, this first day of May, 1874.

JOSEPH P. MAXWELL, [SEAL.]
WILLIAM E. WHEELER, [SEAL.]
BENJ. V. PAGE, [SEAL.]
WILLIAM SPRAGUE. [SEAL.] ”

And the next as follows :

“ Whereas, the undersigned, Joseph P. Maxwell and William E. Wheeler, at the time of the formation of partnership with Benjamin V. Page and William Sprague, under the firm name of Maxwell, Wheeler & Co., on October 1, 1874, contributed to the assets of the said firm on their part, “all their good accounts,” and placed among such good accounts the indebtedness due to them from the West Virginia Oil and Oil Land Company and B. S. Compton; and

Whereas, as part consideration that said B. V. Page and William Sprague would become members of the said firm of Maxwell, Wheeler & Co., and contribute to the capital thereof, the undersigned did guarantee to the said firm the payment of the said indebtedness so due from the said Oil and Oil Land Company and B. S. Compton; and

Whereas, the said firm of Maxwell, Wheeler & Co. has conveyed all its assets, including the said indebtedness, to the Maxwell Oil Company, and the individual members of said firm have become the shareholders of the Maxwell Oil Company, and the amount of the said indebtedness is represented in the shares of stock issued to the undersigned.

Now, therefore, we and each of us jointly and severally do guarantee unto the Maxwell Oil Company the payment to the said company of the full amount of said indebtedness, and hereby deposit with Benjamin V. Page and William Sprague as collateral security that the same will be paid, our shares of stock in the Maxwell Oil Company (87 shares of the said Maxwell, and 113 shares of the said Wheeler,) and give to the said Benjamin V. Page and William Sprague, or either of them, full power and authority to sell said shares of stock or any portion thereof, at public or private sale, without advertising the same, or otherwise giving notice to either of us, whenever,

in their judgment, the terms of the said guaranty shall be broken on our part, and it shall be necessary for the security of said Maxwell Oil Company that such sale shall be made. In case they shall make such sale the proceeds thereof shall be applied to the payment of said indebtedness, with all interest due thereon, and all expenses attending the sale. If there shall be a surplus, the same shall be returned to us.

JOSEPH P. MAXWELL,

WILLIAM E. WHEELER."

It turned out upon subsequent litigation, that there was no indebtedness to Maxwell and Wheeler from the West Virginia Oil and Oil Land Company, although the figures of \$22,792.77 in the agreement between them and Page and Sprague, were inserted by their bookkeeper, at their instance, about October 1, 1874, by taking from their books as due to them from the Virginia Company \$29,659.49.

The account thus shown was by them put in as assets, and so entered upon the books of the new firm. Considering now only that partnership agreement, what did Maxwell and Wheeler guarantee?

The appellee says that it was the payment of what might be really due, and nothing else; not the existence of the indebtedness in fact, as well as the payment. The appellant claims that the latter construction is correct. This is the only construction that really makes the guaranty of any value, and which is consistent with the hypothesis that the parties entering into business relations with each other, requiring capital, had common sense. And it is the construction Maxwell and Wheeler put upon the guaranty the next year, when the corporation was formed, and in the paper they signed they recited that they had contributed to the assets of the firm of Maxwell, Wheeler & Co. "the indebtedness due to them from the West Virginia Oil and Oil Land Company" and "did guarantee to the said firm the payment of the said indebtedness so due."

It is not necessary to inquire whether, under the circumstances so far as they appear, or are to be inferred from this record, this last paper, although all in the past tense in its recitals, should be considered as importing a present agree-

ment that Maxwell and Wheeler, in consideration that the Maxwell Oil Company did then, at their request, take that indebtedness for stock of the company issued to them, guarantee its payment.

The original agreement under which the firm of Maxwell, Wheeler & Co. was formed, was under seal, and besides thereby importing a consideration, shows in its provisions a full consideration for the guaranty contained in it. The assignment by the firm to the corporation of that indebtedness, carried, in equity, all the securities the firm had for its payment, whether guaranties or in more tangible shape. 2 L. C. in Eq. 1667, notes to Ryall v. Rowles; Ullman v. Kline, 87 Ill. 268; Stillman v. Northup, 17 N. E. R. 379; Smith v. Starr, 4 Hun, 123; Craig v. Parkis, 40 N. Y. 181.

The original agreement, being under seal, is joint and several by statute. Sec. 3, Chap. 76, R. S. And in such case, if one covenantor died, a separate action lies against the personal representatives of the deceased, as well as against the survivor. Ballance v. Samuel, 3 Scam. 380. This guaranty being an agreement to which Maxwell and Wheeler were parties of the first part, and Page and Sprague of the second, Page and Sprague might maintain an action of covenant against the appellee upon it, the damages recovered to be appropriated as the supposed indebtedness would have been, if it had been paid. The second agreement, signed by Maxwell and Wheeler, is competent and sufficient evidence against them of the transfer of the indebtedness to the corporation, and, therefore, of the equitable right of the corporation to the performance of the guaranty, or damages in lieu thereof. Of such equity against an estate in the course of administration, the Probate Court has jurisdiction. The cases to this point are collected in appellee's brief in Dogget v. Dill, 108 Ill. 560.

The judgment of the Circuit Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion. In adjudicating the equities, the stock pledged as security must be taken into the account, but the case here does not show what ought to be done in that regard.

Reversed and remanded.

CHICAGO CITY RAILWAY COMPANY

v.

JOSEPH DELCOURT.

Personal Injuries—Street Cars—Negligence—Verdict against Evidence.

1. It is negligence to attempt to board a street car while in rapid motion.

2. In an action against a street railway company to recover damages for injuries received by the plaintiff while attempting to board a street car, this court reverses a judgment for the plaintiff as contrary to the weight of evidence.

[Opinion filed September 11, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. C. M. HARDY, for appellant.

Mr. M. W. ROBINSON, for appellee.

GARNETT, P. J. On August 17, 1886, the appellee was injured in consequence of being thrown to the ground by a cable car of appellant near the corner of 29th and State streets in Chicago. He brought this action against the company, charging in his declaration that he was injured by the negligence of the defendant's servants. The jury found a verdict for the plaintiff, motion for a new trial was overruled, and judgment entered on the verdict. Appellant asked for a reversal on the ground that the verdict was manifestly against the evidence. At the time of the occurrence, the train of cars which caused the injury, was moving north on State street. A stop was made at the north crossing of 29th street to receive passengers waiting there. The plaintiff claims that he was among the number waiting to take passage at that point, and that while the car was at a stand there he made an effort to board the train, taking hold of the hand rail with his right hand and placing his right foot on the step or foot board, but that

before he could raise his left foot the train started with a jerk, and after dragging him some twelve or fifteen feet, threw him violently to the ground, by means of which the injury sued for was produced. He testified that he fell because the train started too quick; that it went with a full start. The only other witness for plaintiff who pretends to have seen him fall, was George Mead, a boy about sixteen years of age, who testified that the train started at full speed without a signal. Both of these witnesses testified that the train was composed of a grip car and two open summer cars. Mead was a news-boy, and was on the train for the purpose of selling, and was trying to sell his papers. He was not acquainted with Delcourt, and the subject was never mentioned to or by him until about a year afterward, when the plaintiff's son saw him selling newspapers and asked him whether he saw the accident. The slight attention given to the matter by Mead and the lapse of time would seem to have been sufficient to prevent his recollection of anything more than the main facts of the occurrence, yet he professes to remember the place in the block where he himself boarded the train, just what part of the middle car he first touched, the number of cars in the train, that the rear seat of the last car was unoccupied, and that the seat immediately in front of it was occupied by passengers; that he did not succeed in selling any papers on that train, that the plaintiff had a hatchet and his dinner-pail under his left arm and put his right hand and foot on the car in trying to get on; that the windows at the front and rear ends of the car were up, and other details too numerous to recite. Much of his recollection, we think, may be accounted for by the fact (admitted by him) that he had heard the plaintiff's testimony and the opening of the case by defendant's counsel. It does not appear probable that he could, under the circumstances, have remembered the various trivial points given in his evidence. To meet the case made by these two witnesses, the defendant called the conductor and grip driver and four passengers. The two employes and two of the passengers testified that the train was composed of the grip car and one summer car only, and several of defendant's witnesses said that they did not see plaintiff among the persons waiting

at 29th street when the car stopped or started. The driver of the grip did not see Delcourt until after he fell, but all the other five witnesses for defendant state, that after the train started and was under full speed, he ran alongside the train and tried to get on the grip, and in making the effort was thrown to the ground. Some of these witnesses say that the plaintiff came on a run from the sidewalk, in a southwesterly direction, in order to catch the train, which had already started north before he made any move toward it. Four of the defendant's witnesses who are wholly disinterested, were seated in the car next to or near the grip, so as to see clearly all that took place, and there is nothing in their evidence to indicate bias or insincerity. Appellee argues that his identification by the defendant's witnesses is not satisfactory, and the accident to which they testify must have been at some other time and to some other person. It is true that some of the witnesses would not swear positively that Delcourt was the man they saw fall, but the time and place given, with other details, leave no reasonable doubt on the point. This is not the ordinary case of proving the defendant not guilty by the employees of the company only, against whose evidence it is commonly urged that their employment and daily bread depend upon the will of an autocratic employer. Juries are in the habit of taking a wide range of liberty in scanning and disbelieving the evidence of such witnesses, but here are four men who have no motive to tell other than the truth, who had ample opportunity of observation, and whose evidence bears internal evidence of fairness and honesty. Such evidence the jury should not lightly put aside, and we think would not, unless misled by passion or prejudice. Trying to board the train when in rapid motion was negligence on the part of the plaintiff, and on the entire evidence no negligence is attributed to appellant. It is with great reluctance that this court interferes with the findings of fact by a jury, but as the case has only been tried once, and the verdict appears clearly against the weight of the evidence, we think justice requires it should be submitted to another jury. The judgment is reversed and the cause remanded.

Reversed and remanded.

IRA C. WOODWARD ET AL.

V.

ILLINOIS CENTRAL RAILROAD COMPANY.

*Railroads—Freight—Failure of Consignee to Remove upon Request—
Storage by Company—Consumption by Fire—Contributory Negligence.*

In an action to recover from a railroad company the value of certain meal placed by it in a warehouse, subsequently consumed by fire, this court declines, in view of the evidence, to interfere with the judgment for the defendant.

[Opinion filed July 11, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon.
JULIUS S. GRINNELL, Judge, presiding.

MESSRS. G. W. & J. T. KRETZINGER, for appellants.

MR. EDWARD R. WOODLE, for appellee.

GARY, J. This case was tried at the Circuit Court by the judge without a jury.

In October, 1885, the appellee received, at its station in Chicago, by car No. 31,396, of the Great Eastern Line, 125 barrels of "Gold Dust" meal, and during that month delivered all but the thirty-five barrels in suit. Twice the appellee notified the appellants to remove it or it would be sent to store; the last notice, on November 11, 1885, stated it would be next day, as in fact it was.

In December, 1885, persons holding orders for twenty barrels of the residue of the meal called for it several times, and were informed by the clerk of the appellee that it had not arrived. He had forgotten the receipt in October, and did not look back in his books far enough to find it. The holders of the orders did not inform the appellants of their failure to get the meal until about January 12, 1886, when called upon

for payment. One of the appellants then went to appellee and upon the information he gave them, the clerk ascertained and informed him that November 12, 1885, the meal had been sent to a storehouse, which was, on the 12th day of January, burned, and the meal was destroyed.

The appellee did not own the storehouse, but that is not material; for their negligence, if any, was in not informing the holders of the orders of the fact that the meal had been removed to the storehouse. It must be, though no authority is cited to the point, that such was the duty of the appellee; yet the law must be reasonable, and not impose a duty so onerous as to make the performance of it impracticable. There must be a reasonable limit to the time during which, without other clue than the presentation of an order for the goods, the carrier shall be required, among a multitude of transactions, to remember, or search the books for a particular shipment. The orders in this case did state the car, and one of them the date of shipment (not of receipt) but not where from, and the car does not appear to have belonged to the appellee. So far as the case shows, those orders might have been consistent with a shipment from any point from which that kind of merchandise could have been sent by rail to Chicago, over any road connecting with the Illinois Central.

The appellants were very negligent in leaving the meal so long without attention, or at least in not giving such information to the persons taking their orders as would enable them intelligently to inquire for it. Which party was guilty of negligence, and in what degree, were questions of fact, taking into consideration what is reasonably practicable in the conduct of the commerce of the country.

The mistake of the clerk was not the proximate cause of the destruction of the goods; fifteen barrels would have been burned if he had told the holders of the orders where to find the twenty barrels. There is no error, and the judgment is affirmed.

Judgment affirmed.

Gary v. Brown.

GEORGE A. GARY

v.

EDWIN H. BROWN.

Garnishment—Attorney and Client—Fees—Lien upon Client's Securities—Receiver—Hindering and Embarrassing the Performance of the Duties of—Garnishment in another State—Sec. 24, Garnishment Statute—Contempt.

1. A receiver may properly be appointed to take possession of and collect a note and mortgage in the hands of an attorney claiming a lien thereon for professional services rendered the reputed owner thereof, upon petition of a third person claiming to own the same.

2. An order making such appointment in no wise disposes of the claims of creditors of the payee of such note.

3. In such case an order enjoining the claimant of the lien from prosecuting garnishment proceedings against the mortgagor and maker of the note in the State where the same were given can not be complained of.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County ; the Hon. KIRK HAWES, Judge, presiding.

MR. GEORGE A. GARY, *pro se*.

Messrs. BLAIR & MARCH, for appellee.

MORAN, J. Appellant was summoned as the garnishee of Margaret Austin and P. L. Austin, in a proceeding by E. A. Barnes to collect a judgment which he held against said Austin. The answer filed by appellant disclosed his possession of a certain note for \$309.71, made by James Maguire, payable to Margaret Austin on or before three years after date, and dated March 9, 1886; also a certain mortgage on real estate in Michigan, from said Maguire to said Austin, to secure said note; that said note was, as appellant supposed, the sole property of Margaret Austin, and that appellant claimed a lien on

said note and mortgage (and other papers in his possession) for professional services rendered to Margaret Austin in certain suits and other matters, amounting to more than \$500. While the garnishee proceeding was pending and undetermined, appellee, Brown, filed his interpleader, claiming that the said Maguire note and mortgage were his property and that Austin had no interest therein, and moved the court to enter an order appointing a receiver to take possession of the said Maguire note and mortgage with power to collect the same. Which order the court entered, appointing one Ford, receiver, and directing appellant to surrender the note and mortgage to said receiver, with which order appellant complied. The receiver at once took steps looking to the collection of said note from said Maguire, who resided in Tuscola county, Michigan, and who, it appears, was ready and willing to pay said note; but appellant commenced a garnishee proceeding against said Maguire and others in Michigan, by which he sought to prevent the payment of said money due on said note to said receiver and to have the same paid to himself in satisfaction of Margaret Austin's indebtedness to him. Thereupon the court below, in a regular proceeding against appellant for contempt in seeking to hinder and embarrass the receiver of the court in making collection of said note, required appellant to terminate so much of the garnishment proceedings instituted by him in the State of Michigan as tended to prevent the payment over to the receiver of the money due on said note, and restrained and enjoined appellant from any further proceeding intended to prevent the collection of said moneys from Maguire for the payment of said note or to hinder or delay the collection thereof by said receiver. From these two orders, the one appointing a receiver and the other enjoining him from prosecuting his garnishee proceeding in Michigan, appellant prosecuted this appeal.

The facts stated in appellant's answer as garnishee made a case entirely appropriate for the exercise of the equitable powers given to the court by Sec. 24 of the garnishee statute which provided as follows: "When it shall appear that any garnishee has in his hands or under his control, any

goods, chattels, choses in action or effects belonging to or which he is bound to deliver to the defendant with or without condition, the court or justice of the peace may make any and all proper orders in regard to the delivery thereof to the proper officer, and the sale or disposition of the same, and the discharging of any lien thereon, and may authorize the garnishee to sell any such property or collect any chose in action, and account for the proceeds thereof, or if the proceeding be in a court of record, the court may appoint a receiver to take possession and sell, collect or otherwise dispose of the same, and make all orders in regard thereto which may be necessary or equitable between the parties."

There was no error in the court's appointing a receiver for the note and mortgage on which appellant claimed a lien, and in requiring a delivery thereof to such receiver for the purpose of collecting the same. Such order in no manner disposed of the claim of appellant to a portion of the proceeds of the note. The claims of the respective parties remain to be determined by the court on their merits, whenever the case is ripe for final judgment.

If the court had the power to appoint the receiver and direct him to collect the note, it follows that the court had the power to aid and protect him in his efforts to collect the same, and to prohibit all parties to the litigation from attempt to hinder, delay or embarrass such collection. The power is one always unhesitatingly exercised by the courts in equity proceedings, the exercise of which is, so far as we are advised, always sustained on review. *Sercomb v. Catlin*, 30 Ill. App. 258, and same case in Supreme Court, 128 Ill. 550. Both the orders appealed from were in all respects authorized, regular and warranted and the motion to dismiss the appeal is overruled; and both of said orders will be affirmed.

Orders affirmed.

JAMES L. CLAPP

v.

GEORGE B. MARTIN.

Landlord and Tenant—Distress for Rent—Household Furniture—Trover—Evidence—Instructions.

1. The addition by the trial court to the verdict in a given case assessing the damages at a sum named "with interest," of words naming the amount thereof including interest, can not be complained of.

2. The failure to mark an instruction not given, "refused," amounts to the same thing as if so marked.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. HANEY & MERRICK, for appellant.

Mr. S. M. MEEK, for appellee.

Per Curiam. This is an action of trover to recover the value of furniture levied on by appellant under a distress warrant issued by him against Olive A. Martin for rent due from her for preinises known as No. 44 Harrison street, in Chicago. Appellee alleged in his declaration that the goods taken were his property, and at the trial the jury found the allegation true, rendering a verdict against appellant for the value of property, and interest thereon at six per cent from the time of the seizure. There was ample evidence that the property in fact belonged to appellee, but appellant says the judgment should be reversed, because, as he alleges, appellee told him, before the levy was made, that the furniture belonged to his mother, Olive A. Martin, and because appellee never set up any claim thereto until this suit was brought, although he was well aware of the levy when it was made;

Clapp v. Martin.

appellant is the only witness who testified to these facts. He relies upon the evidence of W. D. Woodbury to corroborate him on one of the points, but Woodbury's statement is equivocal, and its construction was a matter with which the jury alone could deal. On both points appellee's evidence contradicted that of Clapp, so that it was a case of conflicting evidence in which this court declines to interfere with the verdict.

The jury found the defendant guilty and assessed the plaintiff's damages "at the sum of five hundred dollars (\$500) with six per cent per annum." Thereupon the court added to the verdict the words, "making five hundred and seventy-five dollars," which appellant assigned for error. There is no pretense that the jury could not have included interest on the value of the goods, if they had made the computation and written into the verdict the gross amount of principal and interest. We think they might have done so, and their intention in that respect was plainly to be gathered from the words used in the verdict returned. The action of the court was merely putting the verdict in proper form, was in conformity with the well settled practice, and is sustained by the authorities. *Koon v. Insurance Co.*, 104 U. S. 106; *Smith v. Meldren*, 107 Pa. St. 348; *Burlingame v. Cent. R. of Minn.*, 23 Fed. Rep. 706; *Henley v. Arbuckle*, 13 Mo. 209; *Matheson's Adm'r v. Grant's Adm.*, 2 How. (U. S.) 263; *Clark v. Lamb*, 8 Pick. 415.

The instructions submitted to the court for the defendant were all refused, but the substance of them all was included in others that were given. The correct practice would have been to write the word "refused" on the margin of each instruction which the judge declined to give, but the failure to do this is not material error, as the bill of exceptions discloses clearly the fact of refusal. If an instruction is not marked, and is not given, it is just the same as though it was marked "refused." *Calef v. Thomas*, 81 Ill. 478.

No error is found in the admission or rejection of evidence. The judgment is affirmed.

Judgment affirmed.

GEORGE H. HESS ET AL.

V.

BOARD OF EDUCATION, ETC.

Sales—Set-off—Failure to Perform—Evidence—Instructions—Verdict.

1. In a contention involving the question as to which of several contracts was the true one, evidence tending to show the fact should be admitted by the court, and the question determined by the jury.

2. In an action to recover the value of certain furnaces, this court holds that in view of the issues in the case, the verdict for the plaintiffs for one cent was not sufficiently inconsistent to be reversed.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. CHARLES E. POPE and A. & C. B. MCCOY, for appellants.

Mr. FREDERIC ULLMANN, for appellee.

Per Curiam. This action was brought to recover for certain furnaces furnished by appellants for the purpose of heating the school building in appellee's district. The declaration counted upon a contract in writing with particular specifications as to the condition of the building and the undertakings of appellant. Appellees filed a plea of set-off, setting up a different contract not alleged to be in writing and averred a failure to perform on the part of appellants, and that appellees were compelled to purchase other furnaces at great expense. At the trial appellants introduced a writing signed by appellants, but not signed by appellees, and which appellants contended was the contract under which the heating furnaces were furnished.

Appellees insisted that the contract was a verbal one, and

Hess v. Board of Education.

gave evidence of certain conversations at board meetings, at which a representative of appellants was present and made certain statements and offers which it was claimed the board accepted. Appellants insist that it was error to admit the evidence of what occurred at such meetings and urged such error as one of the grounds for reversing this case.

As appellees denied that the writing not signed by them was the contract and insisted on a contract different in its terms, it was entirely proper for the court to admit all evidence tending to show what the true contract between the parties was, and leave the question to be determined by the jury from all the evidence.

It certainly was not for the court to determine, as a matter of law, which was the true contract. Complaint is made that the court in the instructions given ignored certain portions of the evidence. The instructions given for the defendants were based upon defendants' theory as to what were the terms and conditions of the contract, and on that theory stated the law correctly. Appellants' theory was given in plaintiffs' instructions, and if the jury had believed plaintiffs' contention they would probably have given them a substantial verdict. The verdict of the jury was for the plaintiffs with one cent damages, and it is insisted that this verdict is inconsistent and should not be allowed to stand. We do not think there is any such inconsistency in view of the issues in this case, as invalidates the verdict on that ground alone.

The verdict may not be strictly logical, but the result approximates justice as nearly, probably, as it can be done by any tribunal.

We think there is no error which calls for the reversal of the case and the judgment will therefore be affirmed.

Judgment affirmed.

WILLIAM L. ROSEBOOM ET AL.

v.

CHARLES WHITTAKER ET AL.

Insolvency—Judgment by Confession—Debts due Directors—Attachments in Behalf of other Creditors—Priority.

1. The directors of an insolvent corporation may not apply the assets thereof to the payment of debts due themselves to the exclusion of other creditors.

2. A judgment by confession can not be looked upon as a constructive assignment, until some creditor has sought to have it so declared.

3. Liens accruing before such step has been taken are not displaced by it.

[Opinion filed September 11, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

MESSRS. SMITH & PENCE, for appellants.

MESSRS. HAMLINE & SCOTT, BANGS & BANGS, FRANK A. MOORE, FRANK H. CLARK, and GEORGE M. HAYNES, for appellees.

GARY, J. The appellants were three of four directors of the Charles Whittaker Manufacturing Company, which was insolvent. They took up indebtedness of the company, for which they were sureties, and by resolution as directors elected one of themselves as treasurer, to issue to themselves the judgment note of the company for the amount of such indebtedness, and some others, unpaid, for which they were also sureties.

The treasurer obeyed, judgment was entered and execution put into the hands of the sheriff, who levied on all the property of the company liable to execution. Before the bill in this case was filed, and while the property was in the posses-

Roseboom v. Whittaker.

sion of the sheriff, Childs & Co. and Everett & Post, who are appellees, sued out attachments against the company, put their writs into the hands of the sheriff, and levied them upon the same property. Then the property got into the hands of a receiver appointed by the Circuit Court in chancery in the suit in which the decree appealed from was made, wherein Whittaker, appellee, was complainant.

Why he fell out of the case is now of no consequence. After the property went into the hands of the receiver, judgments were entered in the attachment suits and several special executions issued thereon and put into the hands of the sheriff. The decree directs the payment in full of the judgments in the attachment suits, and the payment of all other debts of the company *pro rata*, so far as the assets will go. The appellants complain that their judgment, execution and levy were held to give them no priority, and that the judgments in the attachments were given a preference over the general indebtedness of the company, including their own, after they were denied priority.

As to their own claims of priority, it is sufficient to refer to *Beach v. Miller*, 130 Ill. 162, followed in this court in *Adams v. Cross W. P. Co.*, 27 Ill. App. 313, as authority that the directors of an insolvent corporation may not apply the assets of the corporation in payment of debts to themselves, and exclude other creditors.

Their other complaint is based upon the decision of the Supreme Court of the United States in *White v. Cotzhausen*, 129 U. S. 329, and its supposed adoption by this court in *Heuer v. Schaffner*, 30 Ill. App. 337.

The case was cited by this court in connection with decisions of the Supreme Court of this State, in support of the principle first announced in this State as to unlawful preferences by an insolvent, in *Preston v. Spaulding*, 120 Ill. 208. If a judgment by confession by an insolvent—a judgment which takes all the assets—is to be held a constructive assignment, because it is in violation of the voluntary assignment act, it is such assignment only, at most, when some creditor has sought the aid of a court of chancery to have it so

declared. Liens accruing before any such step taken, are not displaced by it, and therefore those attachment liens were entitled to preference in the distribution of the assets. There is no error in the decree, and it is affirmed.

Decree affirmed.

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RICHARD S. PEALE

v.

HENRY H. HILL.

Master and Serrant—Book Agent—Sales upon Commission—Evidence.

In an action to recover a balance claimed to be due under a contract to canvass a given county for the sale of a subscription book, this court declines, in view of the evidence, to interfere with the judgment in behalf of the plaintiff.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. N. A. PARTRIDGE, for appellant.

Mr. L. S. HODGES, for appellee.

GARNETT, P. J. Hill made a contract in writing with Peale, dated January 23, 1886, agreeing to go to La Salle County, Ill., complete the canvass of that county for "Grant's Memoirs," and to order 850 sets of the work for the county on or before April 1, 1886, the copies of the first volume which were already delivered in the county to be counted in making up the 850 copies. For his services Hill was to receive forty per cent, but if he failed to order 850 copies, he was only to have thirty-three and one-third per cent. Peale paid to Hill the thirty-three and one-third per cent but refused to pay any more, and this suit was brought by Hill to recover an amount equal to the six and two-thirds per cent.

Olds v. Open Board of Trade.

The case was tried before the court without a jury; there was a finding and judgment for plaintiff, and defendant appeals. On the trial, evidence was given tending to prove performance of the contract by Hill, and there was no contradiction of the statement that he ordered and placed over 900 sets of the work in La Salle county. As a defense Peale offered in evidence another contract in writing, dated June 22, 1885, executed by R. S. Peale & Co., and Peale testified that the duplicate thereof, signed by Hill, was accidentally destroyed by fire. The contract offered by Peale required Hill to canvass the county in a particular manner, to make weekly written reports and to do many other things which were not required by the contract sued on. Peale also offered to prove that the contract of June 22, 1885, had not been carried out by Hill. For Peale it is now contended that the contract dated January 23, 1886, was but supplementary to that of June 22, 1885, but of that no evidence was given. The latter was signed by R. S. Peale & Co. and there is no presumption that Richard S. Peale on June 22, 1885, constituted the firm of R. S. Peale & Co. There is nothing to fill this missing link in the chain of the defense. There is no error and the judgment is affirmed.

Judgment affirmed.

ADELBERT W. OLDS

V.

CHICAGO OPEN BOARD OF TRADE.

Trover—Board of Trade Membership—Certificate of.

1. The measure of damages in an action of trover for the conversion of a paper of no intrinsic value in itself, but evidence of title to a valuable right, interest or property, is the value of the right of which it is evidence of title with interest from the date of the conversion to time of trial.
2. The cancellation of a certificate of membership amounts to a conversion thereof.

[Opinion filed September 11, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Mr. C. H. WILLETT, for appellant.

The court erred in refusing to hold that the facts constituted a conversion of the plaintiff's certificate of membership. The other propositions of law refused depend for their refusal upon this mistake of the trial judge.

Judge Waterman found that the acts of the directors of the open board were void. Because they were void he held there could be no conversion.

In *People v. N. Y. Cotton Exchange*, 8 Hun (15 Sup. C.), 216, it was held to be illegal for a corporation that had issued a certificate of membership to inquire into the question of its equitable owner.

The court found that case to be on all fours with the one at bar; and that the open board had no jurisdiction to try the charges against Olds.

In *Thompson v. Adams*, 93 Pa. St. 55, it was held that an equitable owner of a seat in the Philadelphia Board of Brokers could not share in the proceeds of a sale of the seat upon the death of the legal owner as against members of the board who are creditors of the legal owner.

Clearly, if the court found the action of the open board in expelling Olds and canceling his certificate and issuing it to Marks to be illegal, such acts constituted a conversion of his certificate of membership.

A certificate of membership in the open board is property. *Jones v. Fisher*, 16 Ill. 68; *Weaver v. Fisher*, 110 Ill. 146; *Hyde v. Woods*, 94 U. S. 525; *Powell v. Waldron*, 89 N. Y. 328.

The court erred in excluding evidence of the market value of the certificate of membership at the time of its conversion. *Sturges v. Keith*, 57 Ill. 451; *Cook on Stock*, Sec. 581, case cited; *Dos Passos on Stock Exchange*, 801; *Sedgwick on Dam.* (7th Ed.) 585, cases cited; *Field on Dam.*, Sec. 792.

The evidence showed that such certificate had a market value in January, 1884, at the time of its conversion. The market value was the lowest measure of damages.

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The measure of damages in illustrative cases: Loss of note; its face and interest. *Am. Ex. Co. v. Parsons*, 44 Ill. 312. Lost bond: such sum as the plaintiff is entitled to recover from the obligee in the bond. *Romig v. Romig*, 2 Rawle, 241. A life insurance policy, tortiously obtained, in the absence of other evidence; its face value. *Hayes v. Mass. Mutual Life Ins. Co.*, 125 Ill. 626-637. In trover for title deeds: the full value of the estate. *Loosemore v. Radford*, 9 M. & W. 659; *Ccombe v. Sanson*, 1 Dowl. & Ry. 201; *Mowry v. Wood*, 12 Wis. 413; *Cowles v. Hanley*, 12 John. 483. Stereotype plates for printing labels: the face value to the owner. *Stickney v. Allen*, 10 Gray (Mass.), 352.

The injured party is entitled to damages which will place him in as good condition as though the wrong had not been committed. 1 *Sutherland on Dam.*, 127, 128.

In trover, or analogous actions, the title to the property is vested in the defendant after judgment and satisfaction; others hold judgment alone vests title. *Wood's Mayne on Damages*, p. 510, n. 3.

"Want of title must always be specially pleaded and no evidence can be given under the general issue even in mitigation of damages to show that the property really belonged to another person." *Wood's Mayne on Damages*, 562; *Finch v. Blout*, 7 C. & P. 478; *Jones v. Davis*, 6 Ex. 663.

Bringing a suit for damages is a waiver of plaintiff's right to *mandamus* to be restored to the open board. *State v. Lipa*, 28 O. St. 665.

The finding of one dollar damages was contrary to the evidence.

The evidence that \$500 initiation fee must be paid to become a member, was introduced without objection.

Under such evidence alone, the court should have found \$500.

Messrs. BISBEE, AHEENS & DECKER, and D. M. KIRTON, for appellee.

GARY, J. The case shows that the appellant was a member of the appellees' board. The certificate of his membership

was in the possession of one Sackett. At the instance of Sackett, appellee canceled the certificate. After it was canceled appellant was, by the appellee, excluded from the board. Whether as between Sackett and the appellant, the equitable ownership of the certificate was in the one or the other, is not made clear by this record, and what may be the effect of an inquiry into that ownership, is not touched by this opinion.

It stood in the name of appellant, and was treated by the Circuit Court as his, in awarding him nominal damages.

The declaration is very voluminous, but in effect sets out the circumstances which are a basis for a count in trover for the certificate. Then, treating the action as trover, the question is as to the measure of damages. The paper upon which the certificate was, could have had only an infinitesimal value, but it was the title, or evidence of the title, of the appellant to do business on the board, and the want of it was, by the appellee, treated as the destruction of his right to do business. Both by the offer of testimony and by a proposition of law presented to the court, the appellant sought to have the value of a certificate of membership of the board, with interest, adopted by the court as the measure of damages, which being refused by the court, the appellant excepted. It is apparent that by a certificate of membership the appellant meant, and the court understood, the membership itself—the right to transact business on the board.

In analogous cases this has been generally adopted as the rule, and the value of the right, interest and property of which the paper was the title, or the evidence of the title, has upon conversion of the paper been taken as the measure of the damages. *Am. Ex. Co. v. Parsons*, 44 Ill. 312; *Hayes v. Mass. L. I. Co.*, 125 Ill. 626.

The cases are numerous and collated to a late date, in 3 *Sutherland on Dam.*, 520 *et seq.*, and 2 *Sedgwick on Dam.*, side paging 488 *et seq.*

Whatever variation from this rule may be found in the reports, it has not probably been departed from in any case where the instrument converted was the evidence of the title

Huston v. Boltz.

to something withhold by the defendant from the plaintiff, as in this case.

See the distinction made in *Daggett v. Davis*, 53 Mich. 35.

The intangible membership was not the subject of a conversion; neither is an interest in realty; but the damages for the conversion of a paper of no intrinsic value, which is the evidence of such an interest, are, as against one from whom the interest is derived, who converts the paper and denies the interest, the value of the interest itself.

The court holds that the cancellation of the certificate was a conversion of the paper on which it was, and that for that conversion the measure of the damages *prima facie*, is the value of the right of which that certificate was the evidence of title, with interest from the time of conversion to the time of trial.

The judgment must be reversed and the cause remanded.

Reversed and remanded.

A. C. HUSTON

V.

JOHN H. BOLTZ ET AL.

Sales—Balance on Account—Recovery of—Solicitor of Orders—Evidence.

In an action to recover the price of a lot of cigars, this court, in view of the evidence, declines to interfere with a judgment for the plaintiffs.

[Opinion filed September 11, 1889.]

APPEAL from the County Court of Cook County; the Hon. RICHARD PRENDERGAST, Judge, presiding.

Mr. C. M. HARDY, for appellant.

Messrs. MARSTON, AUGUE & TUTTLE, for appellees.

Per Curiam. An opinion was rendered in this case which is found under the title of Boltz et al. v. Huston, 23 Ill. App. 579. The judgment of the County Court was then reversed and the case remanded. On a new trial in that court there was a finding and judgment for appellees in conformity with the opinion of this court. Appellant, believing new and material facts were proven in the last trial, brings the case to this court again for review. Careful examination of the record fails to reveal any material change in the evidence. Any further review of the law or facts would be mere repetition of what is already set forth in 23 Ill. App. 579. The judgment is affirmed.

Judgment affirmed.

THE CHICAGO CITY RAILWAY COMPANY

V.

FRANK WILCOX BY HIS NEXT FRIEND, ETC.

Street Railways—Negligence of Employees of—Personal Injury—Rules and Regulations—Breach of—Child Six Years Old—Damages—Loss of Leg—Evidence—Instructions.

1. Personal negligence is not to be imputed to a child six years old.
2. A child can not be cut off from compensation for personal injuries suffered through the negligence of another, for the reason that its mother failed to perform her full duty in protecting him from harm.
3. The rule may be otherwise where the suit is for the benefit of the next of kin.
4. The giving of an erroneous instruction which did no harm can not be complained of.
5. This court declines to interfere with a verdict in the sum of \$15,000 in behalf of a child and against a street railway company for the loss of a leg and other injuries suffered through its negligence.

[Opinion filed September 11, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

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Mr. C. M. HARDY, for appellant.

Messrs. C. E. POPE and E. F. MASTERSON, for appellee.

GARY, J. The case made by the appellee on the trial was that in June, 1887, the appellants had a double track street railway operated by an underground cable, on Wabash avenue, in Chicago. At the south side of Harmon Court, an intersecting street, the rear end of a south bound train on the west track had stopped. A north bound train on the east track entered upon the intersection of the streets just as the south bound train was starting southward. The appellee, then a child six years old, was on the west side of Wabash avenue, started to cross it on the south side of the intersection, and as he went by the rear end of the south bound train he was caught by the north bound one, run over, and so injured that he has lost one of his legs, and so little of a stump of it is left, that an artificial leg can not be made available. The opinion of this court on that manner of operating the train has already been expressed in *Chicago City Railway Company v. Robinson*, 27 Ill. App. 26, but it being on a question of fact, a more valuable opinion is that of the company expressed in one of their rules as follows: "Drivers must bring their trains to a full stop when nearing a train on the other track which has stopped or is nearly stopped to let off or receive passengers, and will not proceed until the same can be done with perfect safety. After train is stopped, brakes will not be released until signal is given to start."

The stepmother of the boy was on the east side of Wabash avenue and she and the boy saw each other. She warned him by motions from crossing while the south bound train was crossing Harmon Court; she saw the north bound train approaching, but did nothing to prevent the boy from crossing the street in front of it.

The record is very meager as to the condition in life of the father and stepmother of appellee. All of the instructions asked by the appellants were given, and of those given on behalf of the appellee the only one criticised is as follows:

"3. The court instructs the jury for the plaintiff, that if they, from the evidence, believe that the parents are working people and that the father was not present at the time of the accident, and that the mother was attending to her usual occupation in attending their little store on Harmon Court, in such event the law does not require that persons in their situation in life shall keep constant watch over their children, nor can the want of such care be imputed to the child on account of its age, he being seven years of age or about that, at that time. The fact that a mother on discovering that her infant child is in imminent danger, failed to take the most prompt measure to rescue it from the impending danger will not be imputed as negligence, where it appears she was so excited as to be incapable of calm and deliberate judgment."

This instruction makes a mistake of a year as to the age of the appellee. There is no dispute in the record as to the fact that he was but six, and, therefore, personal negligence is not to be imputed to him. *C. & A. R. R. Co. v. Becker*, 84 Ill. 483; 2 Thomp. Neg., 1181.

But if the condition in life of the parents, and their conduct toward the appellee, as affected by that condition, be a matter to be considered by the jury, the instruction assumes too much.

To the generation of lawyers who, in their earlier reading, found the case of *Bush v. Steinman* accepted as law, the doctrine was also taught that one injured by the concurrent negligence of two carriers, by one of whom he was being conveyed, had no remedy against the other. That doctrine is now rejected by the highest court of this State, and by the highest court of the Nation. *W., St. L. & P. R. R. Co. v. Shacklet*, 105 Ill. 364; *Little v. Hackett*, 116 U. S. 366.

And that a child suing for wrong done him shall be cut off from remedy because others neglected their duty to him, is a doctrine going into "*innocuous desuetude*." It is assumed but avoided in *C. & A. R. R. Co. v. Gregory*, 58 Ill. 226. When the suit is for the benefit of next of kin, negligence of parent may be a bar. *T., W. & W. R. R. Co. v. Grable*, 88 Ill. 441. It has never in this State been decided to be a bar when a child

was plaintiff. The recent text writers repudiate the doctrine and cite numerous cases to support their position. Cooley on Torts, 818, 2d Ed.; Bishop Non-cont. Law, Sec. 581; 2 Thomp. Neg., 1181 *et seq.* In this view of the case the instruction quoted becomes wholly immaterial, and giving it could have done no harm and is therefore no error.

The damages are large, that is, a large sum of money—\$15,000. Are they more than compensation? If the appellee is entitled to anything he is entitled to full compensation. Is that limited to making good the probable pecuniary loss to him from having but one leg to go upon, either natural or artificial, or shall other deprivations which can not be recited without the use of language which excludes arithmetic be taken into account? His life is wrecked, whether for business or pleasure. Hope is denied him. By the various tables of mortality at the time of the trial his expectation of life ranged from forty to fifty years. "Where suffering in body and mind is the result of injuries caused by negligence it is proper to take them into consideration in estimating the amount of damages." *H. & St. J. R. R. Co. v. Martin*, 111 Ill. 219; *Ind. & St. L. R. R. Co. v. Staples*, 62 Ill. 313.

"Of the amount, under the facts, the jury were the sole judges, and where no other evidence of prejudice or passion appears in the finding, courts seldom set aside a verdict for excessive damages in an action like this." *Ill. Cent. v. Simons*, 38 Ill. 242.

And see, also, opinion by Bailey, J., in *C. & E. I. R. R. Co. v. Holland*, 18 Ill. App. 418.

As was said in the case cited from 38 Ill. the court "will not take the responsibility of determining" that the damages are exorbitant. The judgment must be affirmed.

Judgment affirmed.

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Chicago City Ry. Co. v. Pelletier.

been inserted in the bill of exceptions, but it is the signature of the judge that authenticates, though the party is responsible for the sufficiency and certainty of the bill. *Emerson v. Clark*, 2 Scam. 489; *Rogers v. Hall*, 3 Scam. 5; *Liverpool v. Sanders*, 26 Ill. App. 559; *C. M. & St. P. Ry. Co. v. Yando*, 26 Ill. App. 601; same case, 127 Ill. 214.

But looking at everything that has been brought here, the judgment is right. The appellee made a deposit of \$200 on a purchase of real estate, and contracted for a merchantable abstract. The abstract offered seems to have been made by taking a copy in writing from a former abstract made by another office, taking a letter press copy from that copy and from the letter press copy, copying again. The original abstract was not presented.

Treating the question of what is a merchantable abstract, as the parties themselves do, as one of fact, the finding of the judge of the Superior Court is supported by a preponderance of the evidence. It appears that the examination of abstracts, and passing upon titles, is generally done by lawyers. Three of them testified that the abstract was not merchantable; none to the contrary. Three real estate dealers thought it was merchantable, apparently because they thought lawyers would accept it.

The appellee was not obliged to extend the time for furnishing an abstract, but was entitled to rescind and have his deposit back.

Judgment affirmed.

CHICAGO CITY RAILWAY COMPANY

v.

LUCIEN PELLETIER.

Street Railways—Personal Injuries—Assault by Conductor—Liability of Company—Evidences—Instructions.

1. The conductor of a street car may eject therefrom a person, whether

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he has paid his fare or not, who will not behave with common decency, using such force only as may be necessary for the purpose. But such ejection must not take place at a time and under circumstances which make it dangerous to life and limb.

2. In an action brought by a passenger upon a street car to recover for injuries suffered through being pushed therefrom by the conductor thereof, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. C. M. HARDY, for the appellant.

Mr. F. W. TOURTELLOTTÉ, for the appellee.

MORAN, J. This is an appeal from a judgment rendered in favor of appellee and against appellant, for an injury alleged to have been received by appellee by his being pushed from one of appellant's horse cars by the conductor thereof while the said car was in motion.

Appellee's evidence tended to show that appellee and a companion named Olsen, boarded a north bound car on Halsted street near the Stock Yards; that Olsen paid the conductor ten cents, the fare for himself and appellee; that in a few moments the conductor asked appellee for his fare and was told that Olsen had paid for appellee as well as himself; that the conductor denied this and insisted that Olsen had paid him only five cents, and told appellee if he did not pay his fare he would put him off the car. Appellee declined to pay, and insisted that the fare had been paid once, and the conductor stopped the car and took hold of appellee and put him off. That after the car started appellee ran after it and got on again, and his fare was again demanded by the conductor, and on his refusal to pay the car was again stopped and after a considerable struggle with the conductor he was again put off, but again ran after the car and got on the rear platform. He rode for some little distance, the conductor in the meantime disputing with Olsen about the payment of the fare,

Olsen insisting that appellee had a right to ride as his fare had been paid once; when, without saying anything further to appellee about getting off, the conductor ran at him and violently pushed him off the platform while the car was in motion, in such a manner that appellee was thrown under the feet of a horse that was standing at the curb stone and was trampled upon by the horse and severely injured. The account of the matter given by witnesses called for appellant was in many material points in direct conflict with appellee's evidence, but the verdict of the jury must be taken as settling such conflict in favor of appellee. Appellant urges that the court erred in giving the jury, at the request of the plaintiff, the following instruction:

"1. The jury are instructed that even if the jury believe from the evidence that the plaintiff did not pay his fare, or some one pay it for him while riding on defendant's car, and the conductor of said defendant's car, then in charge of the car, did not undertake to remove him in a peaceful manner, using no more force than was necessary, but pushed or threw him off the car while the car was in motion, and without any immediate warning, and he was injured thereby, then the defendants are liable for such injury and damage."

There was evidence introduced by appellant tending to show that at the time appellee was last put off, he was using vulgar and indecent language in a voice loud enough to attract the attention of the passengers upon the car, among whom were several ladies, and the complaint against the instruction is, that it ignores as a ground on which the conductor would have a right to eject him, appellee's conduct in that regard. But the instruction is not addressed to the grounds for putting appellee off, but to the manner of putting him off. The conductor could no more push him off the car while it was in motion for using indecent language than for refusing to pay fare.

Undoubtedly, if he was using profane, vulgar and indecent language, having a tendency to offend and annoy passengers, the conductor would have the right to stop the car and order him off, and on his refusal to go, might eject him, using such

force as might be necessary for that purpose. A person who will not behave with ordinary decency upon a car, and will not leave it at the command of the conductor, may be treated as a trespasser thereon, whether he has paid fare or not, and as such ejected. But the law will not justify the ejection of a trespasser by the conductor or other agent of the company, at a time and under circumstances which make it dangerous to his life or limb.

The rules and the rights of the company must be enforced by its servants and agents with prudence and caution, and trespassers removed from the cars without the exercise of undue, unreasonable and malicious force, in a lawful and proper manner and without the infliction of unnecessary injury. *C., M. & St. P. R. R. Co. v. West*, 24 Ill. App. 44; *State of Minn. v. Thomas Kinney*, 34 Minn. 311.

The instruction stated the rule of law correctly and is not obnoxious to the criticism alleged against it. Some complaint is made of the modification by the court of one of appellant's instructions. The change made by the court was very slight and in no manner altered the law of the instruction as asked. There was no error in said modification.

Counsel has argued the facts at great length, but there being no error in the law and the evidence being in sharp conflict, the verdict of the jury, as we have before said, must be taken as conclusive on the issues submitted to them. The judgment of the Superior Court must be affirmed.

Judgment affirmed.

33	458
43	624
33	458
144s	535

ROBERT S. INGALLS

v.

JOSEPH C. ALLEN.

Master and Serrant — Wages — Commission — Recovery — Change in Occupation — Set-off — Evidence.

Where a given employment continues with no radical alteration in the character of the services rendered, the original contract fixes the rate of wages to be paid.

[Opinion filed September 11, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. FRANK J. CRAWFORD and C. J. WARD, for appellant.

Allen's claim for a commission of \$150, included in his bill of particulars, is destitute of merit, and should have been excluded. Kunde and Ingalls both flatly contradict Allen's testimony on the subject, and cast discredit upon his statements. If he testified falsely on that subject his testimony in respect to the other transactions uncorroborated is unreliable and unworthy of belief. "*Falsus in uno, falsus in omnibus.*"

It is settled law that before a person is entitled to brokerage or commission he must have been employed to negotiate the sale or purchase of an estate, and the sale or purchase must have been effected through the agency or instrumentality of the broker on terms agreed upon by the parties. McGavock v. Woodlief, 20 How. (U. S.) 221; Barnard v. Monot, 42* N. Y. 204; Rees v. Spruance, 45 Ill. 308; Carter v. Webster, 79 Ill. 435; Pratt v. Hotchkiss, 10 Ill. App. 606; Sievers v. Griffin et al., 14 Ill. App. 63.

Messrs. D. J. & H. D. CROCKER, for appellee.

MORAN, J. This action was brought by appellee to recover from appellant wages at the rate of \$40 per month, from January 1, 1885, to November 1, 1887, during which time appellee claimed to have been in the service of appellant, and also to recover \$150 which appellee claimed appellant promised him if a certain farm of appellant's should be sold by appellee's aid, and for some items of money advanced. Appellee went to Kansas to oversee and manage a ranch for appellant under an agreement, as appellee testifies, that he was to be paid \$40 per month and his board and the expense of traveling. Appellant admits that appellee went to Kansas to

manage his ranch, but denies that there was any contract as to what his wages should be, and contends that he was not qualified for, or capable of managing the ranch or performing what he undertook to perform. In the spring of 1889 appellee returned from Kansas, and as he claims, by direction of appellant went to work for him at Oak Park in and about a hotel and livery stable which appellant was operating at that place. Appellant insists that appellee was not in his employ at Oak Park, but that he was appellant's partner in running the livery stable, and boarded at appellant's hotel, and appellant claims to recover for said board in this suit by way of set-off.

On all the material points of dispute between appellant and appellee, the evidence is in irreconcilable conflict, and it was therefore the province of the jury to determine by their verdict which party was entitled to be believed, and it is not competent for this court to disturb the conclusion reached, unless some error of law has intervened.

Appellee testifies that nothing was said about the rate of wages when the employment was changed from the Kansas ranch to the Oak Park hotel and livery stable, and the court gave to the jury, upon that state of facts, the following instruction:

"If the jury believe from the evidence that the defendant employed the plaintiff at an agreed sum per month and expenses, to proceed to Kansas and take charge of a farm, the property of defendant, for an indefinite period, and that subsequently defendant requested plaintiff to return to Chicago and proceed to Oak Park to do certain other work for defendant, and the plaintiff did both with no other different arrangement as to salary and expenses, then plaintiff is entitled to recover for the full time he so remained in defendant's employ at the rate agreed upon in the first instance."

Appellant complains of the instruction and insists that the return from Kansas was the end of that employment, and that if appellee went to work for appellant at Oak Park without any agreement fixing the wages, he was entitled to recover only what his services might be shown to be reasonably worth.

Leahy v. Hair.

We can not agree with counsel's contention. There is no evidence in the case to show the work of supervising a hotel and livery stable is so greatly different in character from that of managing a ranch as to form a basis for the legal implication that the rate of wages altered on a change from one employment to the other without anything being said by the parties to the contract. Where the employment continues, with no radical alteration in the character of the service rendered, the original contract may justly be regarded as fixing the rate of wages to be paid. *Grover & Baker S. M. Co. v. Bulkley*, 48 Ill. 189.

We think, therefore, that the instruction as given by the court, stated the principle correctly. There is some complaint of the modification by the court of some of defendant's instructions and of the refusal to give others. We have considered the suggestions of counsel with reference thereto, and can not agree that the court committed any error in that regard.

There is no ground for the interference by this court with the verdict of the jury on the judgment of the Circuit Court rendered thereon, and said judgment will therefore be affirmed

Judgment affirmed.

EMMA A. LEAHY

v.

JOHN V. HAIR.

38	461
38	141

Agency—Sale of Real Estate—Commissions—Recovery—Title—Evidence of Attorney as to—Verdict.

1. Whether a title to real estate is good or not, is a question of law, and an attorney who is a witness is not to state what his opinion is on such question, but must give the facts as to the title if he knows them, only, and it is for the court to state to the jury whether the title is good if the facts are found as claimed.

2. To recover commissions on the sale of a piece of real estate, the burden of proof is upon the agent to show that the purchaser furnished by him was ready, willing and able to complete the purchase on the terms proposed.

[Opinion filed September 11, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. ADAMS & HAMILTON, for appellant.

The verdict was against the evidence.

To earn his commissions, the broker must furnish a purchaser who is ready, willing and able to complete the purchase on the terms proposed. *Sievers v. Griffin*, 14 Ill. App. 63. Such a purchaser was not furnished. The defendant did not accept S. J. Leahy as a purchaser or make a valid contract with him. The payment of money does not, in itself, show an acceptance of the purchaser. *Heinrich v. Korn*, 4 Daly, 75. Nor does the sale to him of an option. *Pierce v. Powell*, 56 Ill. 323; *Kimberly v. Henderson*, 29 Md. 521. Giving a deed to the grantee named in it for inspection, and on his promise to return it, is not a delivery and will not pass title. *Gilbert v. North Am. F. I. Co.*, 23 Wend. 43; *Braman v. Brigham*, 26 N. Y. 483 (491-2); 3 Washburn Real Est., 300.

The special findings were against the evidence. Improper evidence was admitted.

An attorney's opinion is not competent to prove a defect in the title to land. Conversation with a third party is not competent, unless the one against whom the evidence works is present. An offer of compromise may not be given in evidence against the one who makes it. *Paulin v. Howser*, 63 Ill. 312; *Rockafellow v. Newcomb*, 57 Ill. 186. A non-suit should be granted when plaintiff fails to make a case.

Mr. B. W. ELLIS, for appellee.

MORAN, J. Appellee recovered a judgment in the Circuit Court against appellant for \$625 for commissions in the sale

Leahy v. Hair.

of certain real estate. The evidence tended to show that appellant, by Isaac E. Adams, her agent, left the property with appellee for sale at the price of \$25,000.

Appellee brought one Michael J. Corboy to Adams and a contract was made for the purchase of the property by him at the price asked, signed by Adams as the agent of appellant, and Corboy paid \$500 on the contract.

Corboy's attorney objected to the title and some negotiation was had between Adams and appellee, the result of which was that Corboy got his \$500 back and stepped out of the transaction, and appellee negotiated a sale to one Stephen J. Leahy of the said property for the same price which Corboy had agreed to pay. There is an issue of fact between the parties relative to this substitution of Leahy as the purchaser; appellee claimed that the substitution was made at the suggestion of Adams because Adams did not want to go to the trouble of obviating the objections which Corboy's attorney made to the title, and Adams contending that appellee expected to sell Corboy another piece of property, and desired Leahy to be substituted as the purchaser of appellant's property so as to make two commissions.

As the jury found in answer to one of the special questions put to them that the negotiations for the sale of this property to Corboy were abandoned with the consent of appellee, this particular dispute is eliminated from our present consideration, and the question arising on the present record is whether the verdict for commissions for a sale of the property to Leahy can be sustained upon the evidence as therein set forth.

The terms on which Leahy was to take the property were the payment by him of \$5,000 in cash, and the deferred payments to be secured by trust deed on the property. Leahy made a deposit of \$1,000 with Adams, but the evidence is clear and uncontradicted that he never paid or offered to pay the balance of the \$5,000 cash payment, and it is shown that he, shortly after agreeing to take the property, failed in business and applied to Adams for the return of the \$1,000 deposited, stating that he was unable to carry out the trade. The

burden was on appellee to show that the purchaser furnished by him was ready, willing and able to complete the purchase on the terms proposed, and so the court instructed the jury; but notwithstanding the verdict of the jury, an examination of the evidence satisfies us that not only did appellee fail to show by a preponderance of the evidence that Leahy was able to carry out the trade but the preponderance of the evidence is clearly the other way. In fact the proof that he could not, and did not, complete the purchase, is substantially uncontradicted.

It necessarily follows that this verdict can not stand. As the case will have to be re-tried and the claim on the part of appellee that he furnished in Corboy a purchaser willing and able to take the property on the proposed terms, if the title had proven good, will be then open to re-investigation, with the other questions in the case, we will pass on a point made by appellant with reference to the admissibility of certain evidence relating to that branch of the case. The attorney who examined the title for Corboy was allowed to state on the stand that the title was not good; that appellant's title failed. Whether a title is good or not is a question of law. An attorney who is a witness is not to state what his opinion is on such question of law, but may state the fact as to the title, if he knows what the facts are, and it is for the court to state to the jury whether the title is good if the facts are found as claimed. See *Parmly v. Head*, 33 Ill. App. 134; *Mead v. Altgeld*, 33 Ill. App. 373. The judgment will be reversed and the case remanded for a new trial.

Reversed and remanded.

GEORGE A. HUNTER

v.

JOHN H. GORDON ET AL.

Agency—Sales—Warranty—Breach—Correspondence—Meaning of—Evidence.

Hunter v. Gordon.

In an action to recover upon an alleged breach of warranty of the quality of certain hams, this court holds that the defendant was the agent of the plaintiff in the purchase of the same, not the vendor thereof, and that the judgment against him can not stand.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. PAGE & BOOTH, for the appellant.

Messrs. JOHN WOODBRIDGE and DALE & FRANCIS, for the appellees.

GARY, J. This was a suit by the appellees against the appellant to recover upon a breach of warranty of the quality of hams shipped by the appellant from Chicago, Illinois, to appellees at Glasgow, Scotland.

The evidence as to the condition of the hams when they left Chicago was all from the appellant, and as to their condition on arrival at Glasgow, all from appellees, and neither side had any opportunity to controvert anything the other asserted upon those subjects. The parol testimony in the case related only to those conditions, and to the meaning of a cipher in which the parties conducted their cable correspondence. Their relations to each other must be ascertained from that correspondence and previous letters. The appellees say they were purchasers of the hams from the appellant; he says he was their agent, buying for and shipping to them, for a commission. It adds nothing to the case of the appellees that they, in their depositions, swear that they bought; that the appellant warranted; for they did not meet face to face. So much of the correspondence between them, before the transactions not in controversy, as the record contains, is as follows:

First: A letter from appellees to appellant, dated September 18, 1884, as follows:

"Dear Sir: We should be glad now to have your regular advices about bacon stuffs, as the season is about to begin.

Last year you were too long in communicating with us to get properly started.

"As we understand the terms, you work for one per cent commissions making out the invoices in American money and converted into British money at the exchange you negotiate the drafts at. Please include in your cable offers and quotations one per cent for us.

"Last year we found you were always offering Teufel's brand, is one which we do not like. Can you not get into the way of working Moran & Healy's, which is well liked here?

"Today's values are 60 for L. C. hams, 16, 18, 50 for C. C. bacon, 34 for shoulders.

"We should be glad to learn what the prospects are as to the quantity of hogs in winter and how prices are expected to run.

"The home supply of bacon is expected to be large this season.

"Kindly write and confirm terms of working that we may get started in proper time.

"We have a small sized code of Cunningham & Hunter's and suppose this is what you still use.

"Could you buy special bargains at any time if we left discretionary orders for hams and shoulders in your hands?

"What is likely to be the course of market for beef rumps this season?

"We like to get our cables with prices on Tuesday morning."

Second: A letter from the appellant to the appellees, dated October 29, 1884, containing the following:

"*Dear Sir:* I have your favor of 16th instant and know contents.

"Orders: I thank you for and confirm:

50 boxes L. C. hams, 17, 18 @ 49, shipt all Nov.

100 " " " " " @ 49, Tobey & Booth's.

50 " " " " " 16 @ 48, shipt. all Nov.

Plankinton & Armour, Milwaukee.

"These have my best attention.

"Prices: You may rest assured that you get the lowest.

I put them in cif. because I think better for you to have a definite price, so that you know exactly what you are doing. On the first three lots I sold you, the way freights and exchanges are, I will not have one-half per cent commission. The first lots I cabled prices without any return to you, as no arrangement had been suggested, but all others bear one per cent return.

"Markets have been easier but not for hams. I can not duplicate the sales made to you. I have been trying hard to get Tobey & Booth and Moran & Healy to come down, but so far I can not move them. In fact my offer of the 27th inst. was given without authority, though I knew I could get them to accept. M. & H. are at the same price, forty-nine cents. I will get averages as light as possible. Tobey's will not be over seventeen pounds. I expect Moran's probably eighteen pounds. I will advise you regularly, and hope that business will continue good." * * *

Third: A letter from appellees to appellant, dated February 7, 1885, as follows:

"*Dear Sir:* We have your favor of 26th ult., but you write us far too seldom; you should give us a market report once a week. You write that you have bought the rumps, but never say the brand; how can we sell to arrive without knowing this. We must beg of you to write oftener. We never feel sure what you have actually done until we get the invoices, sometimes weeks after.

"What is the cause of the scarcity of rumps? Do you mean they can not be had at any price? and will the higher prices not bring them on the market again?

"Mr. Lipton once told us that he had an arrangement with his Chicago broker that for an extra one per cent he took risk of allowances for taints in beef shipments during the summer. Would you be prepared to do this?

"Hams are very dull; we are offering your last shipment of Moran & Healy's, 16 Ls. at 47, 3 box weights landed, and have not made a sale. If it were not for Lent beginning in a fortnight, we think hams would improve, as arrivals would be lighter, but we do not know how Lent may affect the demand.

"Shoulders are lower 27, 1, box weights most obtainable; these last Botsfords are not very nice; too salt, and very dark in the meat."

The next communication shown throwing any light upon this case, is a cablegram, July 10, 1886, from the appellant to the appellees, which, when translated, reads: "I offer long cut hams 18 to 20 lbs. average, at 50 shillings 9 pence cif. 100 boxes Barnes-Cherry brand, quality very good. Only offer July. Market firm; difficult to buy at quotations."

"Cif" meant cost of merchandise with freight and insurance to Glasgow added. To this appellees answered: "We order 50 boxes long cut hams at 45 shillings per cwt. cif. under 19 pounds July," and appellant replied, "I renew cable offer of 10th." July 16th the appellees cable, "We order 50 boxes L. C. hams, 18 to 20 pounds, average, at 49 shillings and 6 pence per cwt. cif. offer L. C. hams, 16 pounds, Moran's, prompt shipment." Appellant replied, "Can not execute your order unless you increase limits one shilling. I offer 50 boxes Plankington's long cut hams, 16 pounds average, at 53 shillings per cwt. cif. shipment next month."

Then appellees cable, "Buy long cut hams, 16 pounds average, Plankington's, at 53 shillings per cwt. cif. next month, 25 boxes, shipment first half of August. We order 25 boxes long cut hams 18 to 20 pounds, at 50 shillings and 6 pence per cwt. cif." Then appellant cables, "I have bought and am shipping 25 boxes long cut hams 18 to 20 pounds, at 50 shillings and 6 pence per cwt. cif. I offer 50 boxes long cut hams, 16 pounds, Plankington's, shipment next month, at 55 shillings and 3 pence per cwt. cif."

Then appellees cable, "We order 25 boxes long cut hams, 18 to 20 pounds average, at 50 shillings and 6 pence per cwt. cif. Telegraph immediately if order for 25 boxes long cut hams, 16 pounds Plankington's, at 53 shillings, 25 boxes long cut hams 18 to 20 pounds, at 50 shillings and 6 pence, given in our cable of yesterday, has been executed." To which appellant replied, "Have bought altogether 50 boxes long cut hams 18 to 20 pounds average, at 50 shillings and 6 pence per cwt. cif."

The present controversy relates wholly to the hams mentioned in this last cablegram, and the only question the court is called upon to decide is, whether the appellant is a vendor of the hams to the appellees, or their agent buying for them under their instructions or orders. Turning back to the first letter of appellees, it is clear that by that letter the relation between the parties was not that of vendor and purchaser, but of principal and agent. "You work for one per cent commission." "Could you buy special bargains at any time if we left discretionary orders for hams and shoulders in your hands?" If a meaning is to be studied out of the sentence, "please include in your cable offers and quotations one per cent for us," it is probable that the appellees desired that the cablegrams should represent the cost "cif." to be one per cent higher than it really would be to themselves, for some purpose undisclosed.

There is some difficulty in reconciling the words, "on the first three lots I sold you" in the letter of the appellant with the theory that he was an agent and not a vendor; but the hurried correspondence of busy merchants is not to be construed by rules applicable to the leisurely essays of a Macaulay. The same sentence concludes "the way freights and exchanges are, I will not have one-half per cent commission."

In the last letter of appellees they propose to the appellant an extra one per cent if he would take some sort of risk for taints, but there is no hint in the evidence that any arrangement upon that subject was ever made between them. It should be borne in mind in reading the cablegrams, that the appellant was not a manufacturer of the product in which he dealt; that he kept no stock on hand; that the order he filled was received before the goods were bought; and that the whole tenor of the correspondence, whether by letter or cablegram, shows that the appellees knew his relation to the products. His first cablegram concludes, "difficult to buy at quotations." In one of theirs they say, "buy long cut hams." True, his language relates to other hams than those in controversy, but it would be a mere pretense to say that there was any difference between one transaction and another, as to the relation of the parties to each other.

As to the first twenty-five boxes of the fifty in controversy the appellees cabled, "we order," etc., and the defendant replies, "I have bought and am shipping." As to second twenty-five boxes they next cabled, "we order," etc., and "telegraph immediately if our order * * * given in our cable of yesterday has been executed." To this appellant replied, "Have bought," etc. The hams were shipped by the appellant under bills of lading making them deliverable to his own order at Glasgow, and this is regarded by the appellees as conclusive that he was a principal and vendor and not an agent. But the course of business made this necessary.

The appellant was not in funds from the appellees with which to buy; funds with which to pay for the hams here were raised from banks, by the sale of drafts on the appellees, with bills of lading and policies of insurance attached, and the freight followed the goods. No other course of business was practicable, if he was an agent, but without funds, to buy. It is not necessary to review the subsequent correspondence between the parties; it is not inconsistent with the position of either party as to the relations of the appellant and appellees.

They sent to him an account of their loss, in ambiguous phrase as to whether they looked to him for reimbursement, or for such exertions as would procure it from the packers; they claimed he was habitually a negligent correspondent, even in previous years, as their letters already copied show, and his continued negligence is no admission of any claim upon him.

On the whole case it is the judgment of this court, that whether the parties occupied the relations of vendor and vendee, or agent and principal, is a question to be settled by a review of what passed between them before, and contemporaneously with, the dealings under consideration; and from that review the appellant was the agent of the appellees and the finding and judgment against him are erroneous, and should be reversed.

Reversed and remanded.

Hanchett v. Ives.

SETH F. HANCHETT ET AL.
v.
JOSEPH F. IVES.

28 471
99 34

Trespass—Attachments—Successive Levies—Priority—Sheriff—Constable.

1. The possession of property levied upon, in the hands of a custodian, is the possession of the officer so placing it, and he can maintain trespass against one who removes the same.

2. The levy upon personal property of an attachment issued by one judicial authority to one officer, takes precedence of an execution against the same defendant issued by another judicial authority, to another officer, although the execution was in the hands of the latter before the levy of the attachment.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. JOSEPH E. GARY, Judge, presiding.

Messrs. ABBOTT & BAKER, for appellants.

Messrs. ABBOTT, OLIVER & SHOWALTER, for appellee.

GARY, J. The facts upon which the question of law in this case arise are, that the appellant, Hanchett, was the sheriff, and the appellee, Ives, one of the constables, of Cook County. The sheriff held unlevied, an execution; while he so held it, attachments subsequently perfected by judgments were issued by a justice of the peace of the county, and the writs placed in the hands of Ives. He levied them upon a horse which, under Ives' levy, was left in the possession of Price, a stable keeper. Hanchett claiming a prior lien by virtue of the execution in his hands, took the horse from Price, who voluntarily surrendered him upon being paid the charges that had accrued. For that taking the attorney for the attachment creditors, by Ives' authority, commenced this action for trespass for the

benefit of those creditors to the extent of their judgments, and for Ives' benefit as to some costs. On the trial in the Superior Court, after the appellants had entered upon their defense, they presented a stipulation signed by Ives, to dismiss the suit, and while the appeal has been pending here, a confession of errors signed by him has been presented to this court as a ground for reversing the judgment. The Superior Court and this court have both refused to permit Ives to control the case.

The reasons justifying such refusal have been stated, under circumstances involving the same principle, in *Cohen v. Smith*, 33 Ill. App. 344. The possession of the horse by Price was the possession of Ives, on which Ives could maintain trespass against a wrong-doer. *Brownell v. Manchester*, 1 Pick. 232; cited as authority in *Cannon v. Kinney*, 3 Scam. 9; *Thorp v. Burling*, 11 John. (N. Y.) 285; *Root v. Chandler*, 10 Wend. 110; *Grose, J.*, in *Gordon v. Harper*, 7 Term. 9.

The general question of permanent interest in the case is as to the priority of the execution and the writs of attachment. In the Superior Court, by the pleadings and evidence, the appellee relied upon an alleged agreement between the parties interested in the several writs, that the writs of attachment should have priority, and that in pursuance of such agreement the sheriff had, before he took the horse into his possession, indorsed on his execution a levy subject to the attachments. It is not necessary to take that matter into consideration, holding, as this court does, that the levy upon personal property, of an attachment issued by one judicial authority to one officer, takes precedence of an execution against the same defendant, issued by another judicial authority, to another officer, although the execution was in the hands of the latter officer before the levy of the attachment. That this holding is contrary to what has been generally understood, and in *Rogers v. Dickey*, 1 Gilm. 636, was declared to be the law of this State, must be admitted. That case, however, did not involve the question. The contest there was between the bailiff executing a distress after the lien of an execution had attached,

and the sheriff holding the execution. The fact that the bailiff was a constable was an immaterial circumstance. The distress warrant did not issue from a court; it was the command of a private individual. The constable was not, in executing it, exercising any official power or performing any official duty. All the statute law that was then in force in this State upon the subject of distress for rent, was the one section which is copied in *Penny v. Little*, 3 Scam. 301, and which was Sec. 6 of the act of 1827, concerning landlords and tenants. All that is said, therefore, in *Rogers v. Dickey*, as to the priority of writs in the hands of different officers, was outside of the case before the court. That part of the opinion is supported by no authority cited, except the case of *Wells v. Marshall*, 4 Cowen, 411, in which the whole opinion is: "*Curia*. The case of *Lambert and others v. Paulding*, is decisive that the *fi. fa.* must take preference." In that case the contest was between an attachment issued by a justice of the peace, and levied by a constable after an execution was in the hands of the sheriff; but *Lambert v. Paulding*, 18 Johns. (N. Y.) 311, was a contest between two executions issued out of the Supreme Court of New York, which, by their system, was one and the same court in all the counties of the State, and there is no allusion in the case to the question now here, though the execution was issued in different counties, and the property had been moved from one county to another. The only English case cited in *Rogers v. Dickey* which in principle has any resemblance to this, is *Payne v. Drewe*, 4 East, 523, in which it was decided that the sheriff was liable for a false return, by surrendering goods he had levied upon, and returning a *fi. fa. nulla bona*, because he was informed of a sequestration out of chancery to commissioners against the same defendant, which sequestration was, for the purpose of that decision, assumed to be a lien. It was there held that "where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, they shall be considered as effectual, and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have

been first executed." True, this might mean the execution under which there had been a sale, but that is not the true meaning. "Property once levied upon remains in the custody of the law, and it is not liable to be taken by another execution, in the hands of a different officer." McLean, J., in Hagan v. Lucas, 10 Pet. 400. "The officer who succeeds in making the first levy, thereby obtains priority for his writ, and secures it the right to be first paid out of the proceeds of the sale." Freeman Ex., Sec. 196. No case to the contrary, except Wells v. Marshall, 4 Cow. 411 (since changed in New York by statute—Ray v. Harcourt, 19 Wend. 495), and Rogers v. Dickey, 1 Gilm. 636, where the question was not before the court, has been cited by counsel or found by the court. In the condition of affairs here, with process from Federal courts to the United States Marshal, from the State courts of record to sheriffs and coroners, and from justices of the peace to numerous constables, it is surprising that so little inconvenience has, in forty-five years, been the result of the extra judicial declaration in Rogers v. Dickey. Being extra judicial, no disrespect is shown to the Supreme Court in not following it; and being contrary to the almost unbroken current of authority, it ought not to be followed. Crocker's Law of Sheriffs, Sec. 415; 3 Field's Briefs, Sec. 433.

These views dispose of the case and the judgment being right upon the undisputed facts, it is affirmed.

Judgment affirmed.

GARNETT, P. J., dissents from the conclusion as to the priority of the writ.

THOMAS MACKIN

V.

THOMAS O'BRIEN, FOR USE, ETC.

*Master and Servant—Building Contractor—Balance Due—Recovery of
—Superintendence—Evidence—Custom.*

38	474
47	507
38	474
62	109
33	474
73	28
74	292
33	474
108	1159
108	1159

Mackin v. O'Brien.

1. Between merchants an account rendered and not objected to within a reasonable time becomes a settled account which is conclusive between them, unless fraud, mistake, omission or inaccuracy is shown.

2. The admission in evidence of accounts rendered, which have not been objected to within such time, without the production of the original entries or books from which they were taken, can not be complained of.

3. This court will not consider objections to the introduction of evidence primarily raised herein.

[Opinion filed September 11, 1889.]'

APPEAL from the Superior Court of Cook County; the
HON. ELLIOTT ANTHONY, Judge, presiding.

MESSRS. ROBERT HERVEY and C. STUART BEATTIE, for the
appellant.

MESSRS. RICH & STONE, for appellee.

GARNETT, P. J. During the years 1879 and 1880, appellee was engaged by contract with appellant in furnishing labor and materials for the plastering of certain houses. Written statements of accounts taken from O'Brien's books were delivered by appellee to appellant every two weeks, showing the materials furnished, the names of the mechanics and laborers employed on the work, and the time and prices charged for them. These statements were kept by Mackin, no objection being made thereto, and payments on account were, from time to time, made by him to O'Brien. The last statement was rendered April 2, 1881, and this suit was begun October 26, 1884, to recover the balance due O'Brien. The serious dispute between the parties arises on a charge by O'Brien for superintending the work. He testified that Mackin agreed to pay him a reasonable compensation for superintendence, and evidence was introduced tending to prove what such services were reasonably worth. Mackin testified that there was no such agreement, but that the work was to be done by O'Brien at as low a price as it could be done. With this direct contradiction in the evidence, (plaintiff's version of the contract being corroborated by defendant's failure

to object to the accounts rendered,) the issues of fact were submitted to the jury, and we are not prepared to say that the finding in O'Brien's favor on the question of superintendence is not fairly sustained by the evidence. The admission in evidence of the accounts rendered, against the objection of the defendant, is assigned as error. These documents are said to be secondary evidence and inadmissible until the books from which they were copied were offered. A sufficient answer is, that the objection made to their introduction was general, and not based on the fact that they were of the nature of secondary evidence. Had this specific objection been raised it might have been removed, but it is too late to assert it for the first time on appeal. 1 Thompson on Trials, Sec. 693; I. & St. L. R. R. Co. v. Estes, 96 Ill. 470; Howell et al., Ex'rs, v. Edmunds, 47 Ill. 79.

But the statements were clearly admissible, under the circumstances stated, without production of the original entries or books from which the statements were taken. Between merchants, an account rendered and not objected to within a reasonable time, becomes a settled account, which is conclusive between the parties, unless fraud, mistake, omission or inaccuracy is shown. And, though an account rendered and not so objected to, may not have that conclusive effect between others than merchants, it is held to be evidence of an implied admission of the correctness of the account. McCord v. Manson, 17 Ill. App. 118.

The plaintiff's cause of action having been thus *prima facie* established, the burden of proof shifted to the defendant, without any showing that the items in the account were incorrect. Bucklin v. Chapin, 1 Lans. (N. Y.) 447.

No effort was made by defendant to impeach the accuracy of the statements, nor was any evidence offered to explain Mackin's silence concerning them, and it is a fair presumption that at the time he received them he was satisfied they were not open to any well founded objection. The record discloses no ground for interference with the judgment, and it must be affirmed.

Judgment affirmed.

Williams v. Boyden.

SAMUEL WILLIAMS AND EDWARD N. HURLBUT

v.

NOEL BOYDEN, FOR USE, ETC.

33	477
57	533
33	477
65	389
33	477
68	433

Replevin—Suit upon Bond—Sureties—Dismissal of Suit—Judgment for Return—Failure to do so—Pleading.

33	477
108	1608

1. In pleading at law, every traversable allegation which is not traversed is admitted.

2. An issue settled by the pleadings in a given case must be taken as conclusive.

3. In an action against the sureties upon a replevin bond, it being alleged that the defendants in the suit had judgment for return of the goods in question, and that the same had not been returned, this court holds that the introduction therein of the record of a judgment in the replevin suit, from which it did not appear that a judgment for return had been rendered, would not estop a recovery, for the reason that the averment in the declaration of a judgment of return not having been traversed, the same was admitted, and no proof in support thereof was required.

[Opinion filed September 11, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. CRATTY BROTHERS & ASHCRAFT, for appellants.

Mr. C. S. BEATTIE, for appellee.

MORAN, J. This was an action on a replevin bond against appellants, who were sureties thereon. The declaration averred the execution and delivery of the bond, and the taking of the goods under the replevin writ; that afterward the replevin suit was dismissed, and that the defendants in said suit had judgment for return of the said goods and chattels, and that the same had not been returned. Appellants pleaded *nil debet*, and a special plea alleging that there was no trial of the merits in the replevin suit, and that at the time of the commencement of said replevin suit and at the time of the

trial thereof, appellants were the owners, and entitled to the possession of said goods and chattels. The plea of *nil debet* was demurred out, and the case went to trial on the issues presented by the special plea. Appellees proved their case in the usual manner, except that they unnecessarily introduced the record of a judgment in the replevin suit, from which record it did not appear that a judgment for return of the goods and chattels in question had been rendered by the court, Appellants introduced no evidence, and there was a verdict against them and a judgment for the penalty of the bond and for damages—\$270. From this judgment appellants appeal, and urge that appellees proved, by the record of judgment in the replevin suit, that no judgment for the return of the property was rendered, and no judgment should be against appellants upon the bond, and *Vinyard v. Barnes*, 124 Ill. 349, is relied on to support this conclusion. It does not appear from that case what distinct issues were made by the pleadings.

If the declaration averred a judgment of *retorno*, and the plea put such averment in issue, it was of course incumbent on the plaintiff to prove his allegation, as the Supreme Court said the *onus* was on the plaintiff to show a judgment awarding a return of the property, and having failed to make his proof, he could not have his judgment. Here a different question is presented. The declaration avers a judgment of return, and the plea not having traversed that allegation, it stands admitted on the record, and no proof in support of such allegation was required. In pleading at law, every traversable allegation which is not traversed is admitted. *Capital City Mutual Fire Ins. Co. v. Detwiler*, 23 Ill. App. 656; *Bacon's Abr.*, title, *Pleas & Pldg.*, p. 459; *Hanchett v. Buckley*, 27 Ill. App. 159.

If, then, no record of the judgment had been introduced, the fact that a judgment of *retorno* had been rendered stood conclusively proved for the purpose of the trial. Was the condition changed by the plaintiff's introducing a transcript of a judgment order, which did not show a judgment of *retorno*? We think not; *non constat* that such judgment of *retorno* was not entered during the term. But further, the jury were

L. S. & M. S. Ry. Co. v. Bodemer.

bound to find that issue as it was admitted by the pleadings, or rather, that issue having been settled by the pleadings, must be taken as conclusive, and the jury had no authority to find upon it, no matter what the evidence was. "Whatever has been admitted on both sides in the pleadings can not be contradicted, either in the subsequent pleadings, or even by the verdict." Gould on Pleadings, Sec. 167-168, Chap. 3. "If the jury find one thing contrary to some other thing that is confessed, or not denied, in the pleadings, the verdict is as to so much, bad, because the jury had nothing to do with that which is confessed, or not denied, in the pleadings." Bacon Abr., title, Verdict W. P. 353.

The authorities are in conflict with appellant's contention. The judgment is correct and must be affirmed.

Judgment affirmed.

83	479
139	500
83	479
75	568

LAKE SHORE & MICHIGAN SOUTHERN RAILWAY COMPANY

V.

PHILIP BODEMER, ADMINISTRATOR, ETC.

Railroads—Negligence—Excessive Speed—Personal Injuries—Right of Way—Ordinance—Evidence—Instructions—Trespassers.

1. Wilful or wanton injury to a trespasser is actionable, and it cuts no figure if in such case the person injured was guilty of contributory negligence.

2. A defendant who states the substance of a municipal ordinance in his opening and admits the breach thereof, can not complain of the reading of the same after the evidence is all in, in behalf of the plaintiff, as a part of his argument to the jury.

3. In an action brought by an administrator to recover from a railroad company for the death of his intestate, the same being alleged to have been caused through its negligence, this court holds that the train in question was moving at a reckless rate of speed when the accident occurred, that defendant was guilty of wanton negligence in this regard, and declines to interfere with the verdict for the plaintiff.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

Mr. PLINY B. SMITH, for appellant.

The court admitted improper testimony.

The court admitted, over the objection of defendant's attorney, testimony that people frequently walked upon and across the railroad tracks at the point where the accident occurred. This was clearly error.

It is the doctrine of this State that the frequent use by the public of railroad tracks as a footpath does not impose any duty toward the people so using the tracks or change the relations of the parties in any way. *I. C. R. R. v. Godfrey*, 71 Ill. 500; *I. C. R. R. v. Hetherington*, 83 Ill. 510; *Blanchard v. L. S. & M. S. Ry.*, 18 N. E. Rep. 799.

In *Godfrey's* case, the plaintiff was struck and injured on defendant's right of way, while using the tracks as a footpath. The evidence was that the tracks were frequently used by the public for that purpose. The defendant asked an instruction that "such use should not relieve the plaintiff of the legal duty of extraordinary care and caution at a place of danger, and such use by plaintiff was none the less negligence on the part of the plaintiff because it may have been frequent." This instruction was refused, but the Supreme Court reversed the judgment for plaintiff, and held that the instruction, with other instructions, should have been given. The court say: "There was nothing to exempt him from the character of a wrong-doer and trespasser in so doing, further than the supposed implied assent of the company, arising from their non-interference with a previous like practice by individuals. But because the company did not see fit to enforce its rights, and keep people off its premises, no right of way over its ground was thereby acquired. It was not bound to protect or provide safeguards for persons so using its grounds for their own convenience. The place was one of danger, and such persons went there at their own risk, and enjoyed the supposed implied license subject to its attendant perils. At the most, there was here no more than a mere passive acquiescence in this use. A

mere naked license or permission to enter or pass over an estate, will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident.

* * * The second instruction given for the plaintiff (and the sixth and seventh are liable to the same objection) is erroneous, in intimating the idea that the use of defendant's road by citizens, to walk back and forth upon without hindrance or objection by defendant, constituted the same a public thoroughfare for people to walk upon."

In Hetherington's case, the decedent was injured under the same circumstances. The Supreme Court reiterated the doctrine of Godfrey's case, and furthermore said: "The fact that persons residing in the locality where the accident occurred had been in the habit of traveling upon the right of way of the defendant, and no measures had been taken to prevent it, did not change the relative rights or obligations of the deceased or the railroad company."

The principle is expressly laid down that frequent use of the tracks by the public as a footpath does not change the relative rights of the parties.

In Blanchard's case the Supreme Court expressly re-affirm the Godfrey and Hetherington cases.

It consequently follows, necessarily, that the admission of this evidence was error, and it could not but prejudice the defendant, because, the testimony being admitted, the jury would naturally believe, and have a right to believe, that it had a bearing on the case, and did change the relative rights of the parties. This action of the court was, therefore, prejudicial error.

The court furthermore admitted in evidence, over the objection of defendant, the ordinances of the city of Chicago regulating the speed of trains and the ringing of locomotive bells in said city.

These ordinances were set up in the third and fourth counts of the declaration. It was claimed, however, by defendant, that these ordinances had no application to the case of a trespasser upon the right of way; and this is held in Godfrey's case just quoted.

The court, however, withdrew these counts from the consideration of the jury, and instructed the jury that there could be no recovery under them. There was, therefore, no evidence admissible, save such as was properly admissible under the fifth count. The ordinances were not set up in this count, and municipal ordinances are not admissible in evidence, unless pleaded. *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510; *Blanchard v. L. S. & M. S. Ry. Co.*, 18 N. E. Rep. 799.

In Godfrey's case, it was alleged in the declaration that no bell or whistle was sounded before the engine passed the crossing, and that the engine ran at a great rate of speed, the ordinances of the city being introduced in evidence. On the argument, negligence in the management of the engine was also urged. The Supreme Court, however, said: "But the defendant, under the circumstances of this case, is clearly chargeable with no such negligence as this. It is only for wanton or wilful injury that the defendant is here chargeable, or such gross negligence as evidences wilfulness."

If in the case of a trespasser it is held that the railroad company is not liable for excessive speed, or failure to sound the bell or whistle, even though these acts are alleged in the declaration, how much less shall a railroad company be held liable for such acts, when they are not even pleaded? The admission of this evidence was therefore error on the grounds both that they were not pleaded and that they could not in any event be made the basis of a liability.

Messrs. JOSEPH S. KENNARD, JR., and BRANDT & HOFFMAN, for appellee.

GARNETT, P. J. Philip Bodemer, Jr., a boy about nine years of age, was killed September 8, 1889, by one of appellant's trains, on its track, between 25th and 28th streets, in the city of Chicago, and appellee brought this suit against appellant to recover damages therefor, alleging that the deceased came to his death through gross and wanton negligence of appellant. There was a verdict and judgment against appellant, which it now seeks to reverse.

Just before the fatal occurrence, the deceased and his

brother, the latter about twelve years of age, were on the east side of the tracks, between the two streets named, and a freight train was then moving south on one of the tracks. When it had passed, the boys walked upon the tracks, the elder being in front, and reaching the west side of them in safety. The deceased, however, was struck and killed by a passenger train going north on another of appellant's tracks running parallel and close to the track on which the freight train passed.

The speed of the passenger train was from twenty-five to forty miles per hour. Twenty-five miles per hour was the lowest rate of speed stated by any witness. The bell on the engine was not rung, but just before the boy was struck, the whistle gave two short, sharp blasts.

The tracks of appellant between 25th and 26th streets are in a populous part of the city, and are not guarded in any way to prevent the passage of teams and foot passengers over them.

On each side of them is a space used as an alley or roadway, and just west of the west alley are buildings used for business purposes, fronting the tracks. Passing over the tracks at that place had been a common practice with people living or doing business in that vicinity. Appellant's tracks are laid there over its own private property, but the strip of ground on which the tracks are built connects at the north end thereof with Clark street, so as to make it, apparently, a continuous street to a point south of where the boy came to his death. Appellant contends that as the collision happened on its private property, the deceased was a trespasser, and it is not liable in damages for causing his death. Whether that is a defense depends on circumstances. It has not, in all cases, been held sufficient to exonerate the party causing the injury to the trespasser. In *C. & M. & St. P. Ry. Co. v. Yando*, 26 Ill. App. 601 (affirmed in 127 Ill. 214), the deceased was a trespasser on defendant's track when she was killed, but she was apparently unaware of her danger, and as the engine driver saw her and understood her danger a sufficient distance from her to have stopped his engine by the exercise of ordinary care, the defendant company was held to be guilty of

gross, wilful and culpable negligence, and the verdict of the jury was sustained. See also, C. & A. R. R. Co. v. Gregory, 58 Ill. 226; C., M. & St. P. Ry. Co. v. West, 125 Ill. 320; same case, 24 Ill. App. 44.

It seems to be the uniform rule that wilful or wanton injury even to a trespasser, is actionable. Nor is it material in such cases that the person injured was guilty of contributory negligence. The rule is stated in Cooley on Torts, §10. "Where the conduct of the defendant is wanton and wilful, or when it indicates that degree of indifference to the rights of others which may justly be characterized as recklessness, the doctrine of contributory negligence has no place whatever, and the defendant is responsible for the injury he inflicts, irrespective of the fault which placed the plaintiff in the way of such injury. That is the rule in this State. Litchfield Coal Co. v. Taylor, 81 Ill. 590; C. & N. W. Ry. Co. v. Donahue, 75 Ill. 107. As there was no instruction given to the jury in this case, except one informing them that there could be no recovery on the first four counts of the declaration, we must presume, in support of the judgment, that the facts alleged in the remaining count were found by the jury as unfavorably for the appellant as the evidence would warrant, and we think the evidence fully justified the belief that the train which caused the death, was moving at a reckless rate of speed, through a populous part of the city, the tracks being unguarded, and with surroundings of the character already described. Was the jury authorized from these facts in finding defendant guilty of wanton negligence? We think they were. As the court said in Gregory's case, *supra*, "The train was running with great speed, which it did not slacken as it passed through the town. We consider this, of itself, great negligence." In Yando's case, 26 Ill. App. 601, it was considered a material fact that the engine driver saw the deceased a sufficient distance from her to have stopped his engine by the exercise of ordinary care. The result must have been the same if he had recklessly turned his back, or placed something over the window in the engine cab, so he could not see. If the injury is caused, in a place like that

described in the case at bar, by putting the train in such rapid motion that it can not be checked in time to avoid a collision, which might have been averted if the speed had been only reasonable, the negligence is as culpable as though the engine driver saw the danger and could have prevented the injury, but failed to do so. In the one case, before the danger actually presents itself, he wilfully puts it out of his power to prevent the injury; in the other, he sees the danger and has the power to prevent the injury, but refuses to do so. If there is any degree of difference in culpability in the two cases, we think the law does not recognize it.

On the trial there was offered in evidence by appellee two sections of the city ordinances, one limiting the speed of passenger trains within the city to ten miles an hour, and the other requiring the bell on the locomotive to be rung continually while running within the city. The record does not show that either section was read to the jury as evidence, and counsel for appellant admits that they were not read until after the evidence was all in, and counsel for appellee was addressing the jury. Then the section limiting the speed was read as a part of the address, and was objected to by appellant; the objection was overruled and appellant excepted. The only injury, if any, to appellant from this source, must arise from the reading of the one section in the hearing of the jury, and that must be regarded as harmless, because, in his opening address to the jury, before any evidence was given, that section of the ordinance was stated in substance by appellant's counsel, and he then admitted that the train which caused the death of the boy was at the time running more than ten miles an hour. The opening address of appellant's counsel must still have been fresh in the minds of the jury and the effect thereof would have been as unfavorable to appellant as though the section had never been read.

The instructions requested by appellant and refused by the trial court are too numerous for separate discussion. Many of them were in conflict with the rule above quoted from Cooley on Torts, others were misleading, and we think no material error was committed in refusing any of them.

The general verdict of the jury, as we have seen, was based upon the fact of wanton negligence, and with that fact the answers to the special interrogatories are entirely consistent. The judgment is affirmed.

Judgment affirmed.

GARY, J., took no part in this decision.

DANIEL J. HUBBARD, IMPLEADED, ETC.,

v.

R. HALL MCCORMICK AND WILLIAM H. BEEBE.

Landlord and Tenant—Rent—Recovery of—Set-off—Pleading—General Issue—Evidence.

In an action brought for the recovery of rent, the defendant has the right under the general issue to show payment, accord and satisfaction, and with few exceptions, any other matter which wholly or partly extinguished the cause of action.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. FRANKLIN P. SIMONS, for appellant.

Mr. E. A. SHERBURNE, for appellees.

GARY, J. The appellees demised to the appellant and Carrie L. Metcalfe, two office rooms, for a term of two years, ending April 30, 1886, the rent being \$25 per month, payable monthly in advance. She occupied the rooms part of the first year, when one Clark succeeded her in the possession. The case is not very clearly presented by the record, but it seems to show that Clark left on or before May 1, 1885. January 25, 1886, the appellants commenced this suit in

assumpsit against the lessees. The appellant alone was served and defended. The declaration alleged that \$225 of the rent was due and unpaid when the suit was commenced. The finding of the court, trying the case without a jury, was for the appellees, \$265. This amount could not be made up by accruing interests, and the discrepancy can only be disregarded by the application of the rule stated in *Thomas v. Roosa*, 7 Johns. (N. Y.) 461, that the court will intend that the damages could not have been given if a good breach of the contract to pay had not been shown. On the trial the appellant testified that Clark had the rooms furnished in fine style, and enumerated a number of articles which must have been of considerable value, and offered to prove the actual value, and that one of the appellees told the appellant that they had taken the furniture on account of the rent. This offer was rejected, upon the ground that a set-off could not be admitted under the general issue.

But it was not a set-off. If taken on account of the rent, it was satisfaction of the rent to the extent of its value, if no price was agreed upon; or to the extent of the price, if agreed upon. Under the general issue the appellant had the right to show payment, accord and satisfaction, and, with few exceptions, any other matter which wholly or partly extinguished the appellee's cause of action. 1 Ch. Pl. 478, Ed. 1844.

The refusal to admit this testimony was erroneous, and being excepted to, and now assigned as error, the judgment ought to be reversed. But the case, *Nason v. Letz*, 73 Ill. 371, stands in the way. There, as here, proper evidence was excluded; there, as here, the bill of exceptions did not show a motion for a new trial denied, and upon that the court say: "We are prohibited from inquiring into the question whether the court erred in rejecting this evidence. It was only ground for a new trial if erroneous, and should have been so urged; and on overruling the motion, it should have been preserved in a bill of exceptions, before error could be assigned on that decision of the court." That case has been twice cited since by that court in volumes preceding Vol. 120. Whether in later ones can not readily be ascertained. It has not

been criticised. The report of that case, however, does not show that the action of the court in rejecting the offered evidence was excepted to at the time. It is a probable inference that it was, but not certain. It seems unnecessary that a court should commit the same error twice before it can be corrected.

The reasoning and the authority to the contrary in *Levenberger v. Paul*, 25 Ill. App. 480, is satisfactory and convincing. *Gauche v. Mayer*, 27 Ill. 134; *Lowe v. Moss*, 12 Ill. 477.

Reversed and remanded.

THEODORE KOLB, BY HIS NEXT FRIEND, ETC.,

V.

CHICAGO STAMPING COMPANY.

Master and Serrant—Minor Serrant—Duty to Instruct and Protect—Machinery—Failure to Guard—Request "to hurry"—Personal Injuries—Contributory Negligence—Evidence.

1. In an action brought by a servant to recover from his employer for injuries alleged to have been suffered through his negligence, this court holds, that the risks attending the use of the machine in question were obvious and assumed by the servant as incident to his employment, and that failure to guard the treadle in question did not constitute negligence on the part of the defendant.

2. Evidence in such case that other boys had been injured by similar machines in the same shop, should not be considered.

[Opinion filed September 11, 1889.]

APPEAL from the Circuit Court of Cook County the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs. ALLAN G. STORY AND FRED W. STORY, for appellant.

Mr. R. S. THOMPSON, for appellees.

MORAN, J. This action was brought by appellant by his

33	486
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44	60
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60	279

next friend, to recover damages from appellee for the loss of the fingers of his right hand in a stamping machine owned by appellee, and at which appellant was working.

At the close of plaintiff's case the court instructed the jury that the evidence was insufficient to sustain a verdict for the plaintiff, and that they should find for the defendant. This ruling of the court is the error assigned on the appeal. The evidence shows that appellant, who was at the time something over sixteen years of age, applied to appellee's superintendent for employment in the stamping shop, and was taken by the superintendent to a foreman, who was told to set the boy to work on a press. The foreman took him to a machine for pressing bottoms for coal hods.

The stamp which did the pressing was operated by steam and was set in motion by the operator pressing a treadle with his foot. The scuttle bottom to be shaped was laid on the die and iron clamps closed around it, which clamps have handles by means of which the operator holds the bottom in such manner that when the die descends it presses the bottom into a new shape with a projecting lip over the top of the rim of the clamps. When the treadle was pressed by the foot, the die came down, and then returned to its place and remained there till the treadle was again pressed. The foreman stood by appellant while several bottoms were pressed, and as he operated the machine all right, left him, and appellant worked at the machine the remainder of the day, and the next day, and the third day till about four o'clock, when the accident, which caused the injury, occurred. About half an hour before the happening of the accident the foreman came around, and finding appellant sitting resting and the press idle, told him to hurry up and go to work, that he wanted to get rid of that die and put another in its place, and appellant resumed work and continued for a while and then sat resting again. The foreman returned and found him idle, and said to him that he must hurry up, that if he could not do better than that they would have to put another man in his place; that they did not want such men in the shop as he was.

Appellant began work and in a few moments one of the bottoms stuck on the die. While endeavoring to remove the bottom or pan he leaned forward on the high stool on which he was sitting and his foot pressed down on the treadle bringing the punch down on his hand and cutting off his fingers. There is no evidence in the case that the machinery was not all in perfect repair, and in good working order, or any evidence tending to show that the appliances for doing the work were not of the usual kind or that they lacked any safeguard that was in use on such machines, or that its operation was attended with any danger not plainly apparent, and not easily avoided by ordinary attention. Counsel for appellant strenuously argues that it was negligence not to have the treadle boxed, but there was no evidence introduced to show that it could be boxed or that it was usual or customary to box treadles on such machines. The case in this respect differs materially from that of *Rummel v. Dilworth*, 111 Post. 343, cited and relied on by counsel. In that case the court say that there was evidence tending to show that closing the gate was attended with danger that the operator was liable to be caught in the cogs.

There is evidence also, that this difficulty was easily obviated by the extension of the guard rail to cover the point of danger, and that this appliance was reasonably necessary for the safety of the operator, but that in fact the rail was wanting where most required.

The offer to show that other boys had been hurt by similar machines in the same shop was not competent; *non constat*, that they were not injured entirely by their own fault or carelessness. The admission of such evidence would require the trial of their cases in this suit. So far as we can gather, all danger attending the operation of this machine would be perfectly obvious to any boy of ordinary capacity, of appellant's age or even much younger. He knew that a pressure of the foot upon the treadle brought down the upper die or stamp, and he knew that the pressure of such stamp on the lower die would crush whatever was beneath it, and employers are not required to instruct or protect against such obvious

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dangers. Taking all the evidence introduced by appellant, with all the legitimate inferences which can be drawn therefrom, we are unable to perceive that appellees were guilty of any wrong or negligence which could be made the basis of a verdict in favor of appellant.

Unless we should be prepared to hold that an employer is liable for every accident that happens to a boy in his employ, though caused by the boy's own negligence or want of ordinary care, and when the employer is guilty of no negligence, we can find no ground on which a verdict in favor of appellant could rest.

We think there was no evidence to sustain appellant's case, and that the court properly instructed the jury to find for the defendant.

Judgment affirmed.

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FANNY BERNAUER AND VALENTINE RUH

V.

HARTMAN STEEL COMPANY.

Master and Servant—Negligence of Servant—Master's Liability—Independent Contractor—Evidence.

In an action brought by a tenant against his landlord for the recovery of damages for injury suffered through the overflowing of a tank, caused by the negligence of the employes of a plumber engaged in making certain repairs in the building in question, this court holds that the said plumber was not an independent contractor, and declines to interfere with a judgment in behalf of the plaintiff.

[Opinion filed September 11, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. ARNOLD TRIPP and EUGENE EHRLICH, for appellants.

If there is any liability at all it is for actual damages, and this must be proven. In this case one witness only testified on this point, and that was Mr. Williams. The total damage

was about \$400. "I can not tell in detail how much the damaged goods were sold for;" this is all the evidence offered as to damage. Now we submit that the rule as to damages is not about a given sum but such damages as were sustained actually; and about \$400 may mean only \$395 or even less; such evidence should not have been considered, and if considered, does not furnish a measurement from which the court can find any amount.

As to the law in the case: The evidence shows that Ruh was employed as a plumber to do a specific job. He employed the man who did it; he assumed entire control of the work, gave the necessary directions, took possession of the premises at the time of doing the work, and did the job according to his own skill and judgment, in a good, workman-like manner, without any interference or suggestion from the owner or her agent. Ruh was an independent contractor, and not a servant. *Quarman v. Burnett*, 6 Mees. & Wel. 499; *Milligan v. Wedge*, 12 Adol. & Ellis, 737; *Butler v. Hunter*, 7 Hurlstone & Norman, 826; *DeForest v. Wright et al.*, 2 Mich. 369; *Stone v. Codman*, 15 Pick. 297; *Shearman & Redf. on Negl.*, Sec. 74-76 and 77 (2d Ed.); *Harrison v. Collins*, 86 Pa. State, 153; *Scammon v. City of Chicago*, 25 Ill. 361; *Hale et al. v. Johnson*, 80 Ill. 185.

The owner of fixed property is not liable for wrongs of an independent contractor, or his servants. 2 *Thompson on Negl.*, 899; *Hoit v. Whately*, 51 Ala. 569; *Shaw v. Crocker*, 42 Cal. 435; *Harrison v. Collins*, 86 Pa. 153; *Linton v. Smith and others*, 8 Gray, 147; *Wharton on Negl.*, Sec. 181; *Corbin v. American Mills*, 22 Conn. 274; *Prairie State L. & T. Co. v. Doig et al.*, 70 Ill. 52; *Scammon v. City of Chicago*, 25 Ill. 434; *Shearman and Redfield on Negl.*, 100; *Hole v. Railway Co.*, 6 Hurlstone & Norman, 497.

The evidence establishes the fact that the plaintiff's goods would not have been damaged if a certain faucet marked "B" had not been left open in the night. The trial court must necessarily have found that Ruh's workman left it open, and did not notify anybody not to turn it different from the way he left it. This finding was contrary to the evidence. But

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supposing that such was the fact, the act which caused the damage did not result from the authority of the defendant, Fanny Bernauer. The authority under which the plumber who did the work acted was that of his master. He could not have two masters at the same time. Ruh was his master; he hired him; he directed him what to do. The agent of the owner was not present at any time during the progress of the work. Fanny Bernauer did not do the act which caused the mischief. It was not done by one acting under her command or request, it was not done by one over whose conduct she had the efficient control, whose operations she might direct, whose negligence she might restrain. She can not be held liable, unless upon the general proposition that a person shall be answerable for any injury which arises in carrying into execution that which he has employed another to do. The law does not impose so broad a responsibility. *Rapson v. Cubitt*, 9 M. & W. 710 (1842); *De Forrest v. Wright*, 2 Mich. 368; *Hilliard v. Richardson*, 3 Gray, 349; *City of Chicago v. Robbins*, 2 Black, 418.

Messrs. E. H. & N. E. GARY, for appellee.

The plumber was grossly negligent in many respects. He failed to notify appellee of the change, so as to permit its officers to protect its property; he failed to close and tighten stop-cock H; he failed to notify any one about the premises of the danger, or how to prevent damage, and closing the waste-pipes was not only unnecessary but a most bungling job; he left the premises at 3 o'clock in the afternoon. There was ample time that day before the water rose to put in a piece of pipe in pipe A, thus closing the gap and preventing damage. Even if the water had come through the sink and the faucet had been left open, or the surplus water had gone through the branch pipe in which stop-cock B was located, and the stop-cock had been opened and left open by an unknown person, still the negligence of the plumber was the proximate cause of the damage, and appellants would be liable.

As to the amount of the damages, the manager of appellee testified that the damages for which claim was made, were

about \$400. That there were other items of expense, but he did not have the details and made no claim for them. Extra effort was made by appellee to preserve the property and make the loss as small as possible. Cross-examination would have brought out further details if they were desired.

Upon the question of the liability of the owner, Bernauer, little need be said. The plumber was not an independent contractor, nor in possession or control of the property. He was simply an employe, a servant, subject to the orders and control of his employer.

Per Curiam. The judgment in this case is based on the negligence of appellants by which a certain water tank was overflowed and damage thereby caused to the stock of hardware of appellee in the building where the tank was situated.

The case was tried by the court without a jury, appellants found guilty and the damages assessed at \$400. It is one of the class of cases in which appeal is so often made to this court to reverse, on the ground that the finding or verdict is contrary to the evidence. A reading of the evidence leaves a conviction on the mind that the theory of appellee is probably correct, and the finding of the trial court in conformity with the most reasonable deduction that can be made from the evidence will not be set aside here. Ruh, one of the defendants, was a plumber who was employed by the owner of the building, Fanny Bernauer, to make some changes and repairs in the plumbing, and his employe's negligence in performing the work caused the injury to appellee's goods. Appellants now insist that Ruh was an independent contractor, for whose neglect Bernauer was not liable. The terms of the employment of Ruh are not given and it must, therefore, be assumed that no special terms were agreed on. He was employed generally to do the required work, and was for that purpose the agent or servant of his employer. Possession or control of the building or plumbing or any part of it was not given to him. His employer had the right to control and direct the entire work, and might have discharged Ruh from the employment if he refused to obey her instructions.

Singer v. Leavitt.

The character of his employment bears no resemblance to that of an independent contractor. *Glickauf et al. v. Maurer*, 75 Ill. 289; *Cooley on Torts* (2d Ed.), 643.

There is nothing in the lease from appellant Bernauer to appellee which exempts her from claims for damages caused by the neglect of herself or employes in making repairs on the plumbing in the building. We think there is evidence which supports the finding as to the measure of damages.

The judgment is affirmed.

Judgment affirmed.

EDWARD T. SINGER, ASSIGNEE,

v.

MICHAEL B. LEAVITT.



Insolvency—Assignment—Contract of Insolvent—Assumption of by Assignee—Theatrical Troupe—Guaranty—Evidence—Order of County Court.

1. The County Court may properly order the payment of debts incurred under duly authorized contracts entered into by an assignee for the purpose of preserving the property involved, and rendering it available to the creditors.

2. This court affirms an order of the County Court directing the payment of a certain balance claimed to be due the manager of a theatrical troupe who entered into a contract with the proprietor of a theatre to play therein a season of one week upon a certain guaranty, said contract having been assumed by the assignee of such proprietor, who subsequently made a voluntary assignment for the benefit of his creditors.

[Opinion filed September 11, 1889.]

APPEAL from the County Court of Cook County; the Hon. E. H. GARY, Judge, presiding.

Messrs. HANEY & MERRICK, for appellant.

Messrs. GENTLEMAN, RICHOLSON & NOLAN, and CASE, JUDSON & HOGAN, for appellee.

An order of a court such as is referred to in this case, implies consent that all expenses in connection with carrying the same into effect shall be paid out of the first moneys on hand. Beach on Receivers, p. 299.

Since it is impossible for the assignee to operate a theatre without incurring expenses, it is entirely reasonable that the property to be benefited by his management shall bear the cost of it. It is equally reasonable that his necessary expenses in operating and managing the theatre shall constitute a lien in preference to all other obligations. Wallace v. Loomis, 97 U. S. 286; Miltenberger v. Logansport R. R. Co., 106 U. S. 286; Taylor v. P. R. R. Co., 7 Fed. Rep. 377; Atkins v. Petersburg R. R. Co., 3 Hughes, 307.

The courts go further and hold that where the best interests of all concerned demand the continuance of a business, or the operating of a railroad, that "the debts incurred thereby have priority over the incumbrances." Gilbert v. W. C. G. T. R. R. Co., 33 Gratt. 586.

There is no doubt that the assignee had the power to make such a contract, and that whatever loss may have arisen under such contract, should be payable out of either the income of the property in his hands or out of the estate itself. If the court, through the assignees, sees fit to operate a theatre with the honest intention of thereby enhancing the value of the estate and security of the numerous creditors, then it does not lie either in the mouth of the assignee or the creditors to object to the payment of such claim, in the event of a loss, inasmuch as they would have been benefited had the theatre made money. Under such an agreement as was made by the assignee in this case, we are satisfied beyond any question whatever, that the claim of the appellee is a first lien upon the property in the hands of the assignee, superior and paramount to all others, and should be paid as one of the charges incident to the management and control of the theatre while in the hands of the assignee as the representative of the court. The following authorities we think will fully sustain our position: Cowdrey v. R. R. Co., 1 Woods, 330; Cowdrey v. R. R. Co., 93 U. S. 352; Fosdick v. Schall, 99 U. S. 235;

Union Trust Co. v. Illinois Midland Co., 117 U. S. 455; High on Receivers, Sec. 395; Noyes v. Ritch, 52 Me. 115; Blumenthal v. Brainard, 23 Vt. 402; Gilbert v. R. R. Co., 33 Gratt. 586; Southern Law Review, Vol. 4 (N. S.), page 29; American Law Review (1883), page 832.

MORAN, J. Appellee, who was the manager of a theatrical company, on the 18th of July, 1888, entered into a contract with Baker, the owner of a theatre at that time being built on Wabash avenue in Chicago, to play a certain season of one week with his company at said theatre. The time first fixed in the contract for beginning the season was April 7, 1889, but it was afterward changed at the request of Baker to December 10, 1888. By the contract appellee was to furnish the stage representations, etc., and was to receive seventy per cent of the gross receipts of each performance, and the said owner of the theatre guaranteed that appellee's share should reach the sum of \$2,500 for the week. Before the time came for the commencement of the engagement, Baker, the owner of the theatre, made a voluntary assignment for the benefit of his creditors, of the theatre and other property, and the assignee petitioned the court for leave to keep the theatre running, representing that such course would be for the best interests of the property, and in order to do so asked leave to go forward with the engagement made with appellee, and thereupon the court ordered the assignee to operate said theatre until the further order of the court, unless cause should be shown to the contrary within five days. Thereupon the assignee indorsed the contract between appellee and Baker as follows:

"Pursuant to the order of the County Court *in re* Baker et al., I hereby ratify the within contract.

"W. W. CHARLES, Assignee."

"Chicago, Dec. 2, 1888.

Thereupon appellee commenced his engagement at said theatre at the time fixed in said contract and played for one week, and afterward filed his petition in the County Court stating the foregoing facts, and that there was due to him under the

terms of the said contract, \$1,019.80, which the court ordered the assignee to pay out of any money in his hands after paying all expenses of administration, and all expenses of the said business as carried on by the assignee; but the court reserved the question whether or not said claim should be paid out of a sale of the property owned by the insolvent at the time of the assignment. From this order the appeal is prosecuted.

As we understand this order, it has relation to the payment of an indebtedness incurred in managing and conserving the property in the hands of the assignee, and if it be admitted that the court has power and authority, and that it is the duty of the court to pursue such course with reference to the property which comes to its hands as will best preserve its value and render it most available to the creditors, as to which it seems to us there can be no doubt, then it must follow that the court is to exercise a reasonable discretion as to its operation and management. It was impossible in the nature of things for the assignee to operate the theatre without incurring expenses and making contracts, and it would be certainly unjust for the court to authorize the incurring of an expense for the benefit of the property, and then turn the one who, on the faith of such order, furnished services, over to seek remuneration by sharing with ordinary creditors in the final distribution of the assets. What is done to preserve the estate to the creditors may well be done at the cost of the estate. Appellee does not come in making a claim against the estate as a general creditor. He is merely seeking pay for what he has done for the estate after it came to the hands of the assignee, with the assent of the assignee and the approval of the court.

There is nothing in the record tending to show any abuse of discretion on the part of the court, and the order appealed being one of discretion, can only be reviewed for manifest abuse of the court's power.

Order affirmed.

WILLIAM R. HAMILTON

v.

IRA R. HARVEY.

Master and Servant—Services Rendered—Recovery for—Real Estate Broker—Ordinance as to, Secs. 1 and 3—Licenses.

In an action to recover compensation for services rendered in the city of Chicago in negotiating a lease, this court holds that the acts in question are not within the municipal ordinance touching the necessity for real estate brokers to be licensed.

[Opinion filed September 11, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. MILLER, LEMAN & CHASE, for appellant.

We contend :

1. That the sole purpose of the ordinance in question is to get revenue, and that it does not assume to reach or affect the validity of contracts made by an unlicensed broker; and that such contracts are not affected thereby, or against any public policy, or void, but are valid; and that the cases where contracts of an unlicensed person are held void are where the purpose of the license law is something beyond getting revenue from the license fee, *e. g.*, the protection of the public interests or to carry out a public policy. *Smith v. Mawhood*, 14 M. & W. 452; *Johnson v. Hudson*, 11 East (K. B.), 180; *Brown v. Duncan*, 10 B. & C. 93; *Bailey v. Harris*, 12 Q. B. 905; *Cope v. Rowland*, 2 M. & W. 149; *Tyler v. Larimore*, 2 W. R. 179; *Aiken v. Blaisdell*, 41 Vt. 655; *Griffith v. Wells*, 3 Denio, 226; *Larned v. Andrews*, 106 Mass. 435; *Pope v. Beals*, 108 Mass. 562; *Taliaferro v. Moffett*, 54 Ga. 150, 153; *Lindsay v. Rutherford*, 17 B. Mon. 245; *Strong v. Darling*, 9 Ohio R. 201; *Pangborn v. Westlake*, 36 Iowa, 546.

2. That this contract in question in itself—in its consider-

ation and matter to be performed—is not forbidden by law, but is legal and unobjectionable; and that it does not provide for, or in itself contemplate, a violation of the ordinance. And the fact that the plaintiff has violated the ordinance in something to be done on his part, does not taint the contract with illegality or prevent him from recovering for a breach of it. *Wetherell v. Jones*, 3 B. & Ad. 221; *Story on Contracts*, Sec. —.

3. That the common council of the city of Chicago has no power to pass an ordinance having the effect claimed by appellee for this one, or to prohibit the business of real estate brokerage, or to make the contracts of an unlicensed real estate dealer illegal. That a municipal corporation has no powers except such as are expressly given by the statute, or necessarily implied in or incident to the powers expressly granted. 1 *Dillon, Mun. Cor.*, Sec. 89; *Schott v. People*, 89 Ill. 195; *Cook Co. v. McCrea*, 93 Ill. 236. That the statute giving municipal corporations the power to tax and license brokers does not expressly or by fair implication authorize them to make their business or contracts unlawful if license is not taken out. *Rev. Stat.*, Chap. 24, Art. V, Sec. 63, clause 91; 1 *Starr & C.*, 473. That this provision of the statute authorizes such a license ordinance as may affect the *person* of the broker and not his *business* or *contracts*; and that the ordinances in question affect only the *person* of the broker, making him subject to the penalty if it is violated, but does not affect the *business* or *contracts* of the broker. That under the ordinance no qualifications are required, and any person who desires to carry on the business of a real estate broker is entitled to the license on payment of the license fee, and the ordinance does not seek to regulate the business; and that there is no public policy violated by the contracts or business of a real estate broker who carries on his business in the city of Chicago without having taken out the license required by the ordinance.

4. That the question of the violation of the ordinance and its effects is solely a question between the city of Chicago and the broker who violates it; and that a person dealing with

such broker has no concern therein nor any right to raise the question in a suit upon the contract between himself and the broker.

5. That such ordinance is penal, and is to be construed strictly. And that the transaction in question in the case at bar—negotiating a lease—does not come within the definition of a real estate broker contained in the ordinance. And that, therefore, has no application to this case.

6. That the Circuit Court on the evidence should have held plaintiff entitled to recover. And on defendant's motion to take the case from the jury and to instruct the jury to find for the defendant, the court should have directed judgment for plaintiff as on a demurrer to the evidence.

Mr. JAMES FRAKE; for appellee.

Whatever other courts may have held, the Supreme Court of this State has decided that, "When the Legislature prohibits an act or declares that it shall be unlawful to perform it, every rule of interpretation must say that the Legislature intended to interpose its power to prevent the act, and, as one of the means of its prevention, that the courts shall hold it void. This is as manifest as if the statute had declared that it should be void. To hold otherwise would be to give the person or corporation the same right in enforcing prohibited contracts as the good citizen who respects and conforms to the law." *Cincinnati Mut. Health Assurance Co. v. Rosenthal*, 55 Ill. 85 (at 91).

This is likewise true of an ordinance of a town or city. In *Mason v. Shawneetown*, 77 Ill. 537, the court says: "When an incorporated town or city has been vested with a power to pass ordinances by the Legislature for the government or welfare of the municipality, an ordinance enacted by the legislative branch of the corporation, in pursuance of the act creating the corporation, has the same force and effect as a law passed by the Legislature, and can not be regarded otherwise than as a law of and within the corporation."

To the same effect are *Wright v. C. & N. R. R.*, 7 Ill. App.

438 ; *Hopkins v. Mayor of Swansea*, 4 M. & M. at page 640; *Heland v. City of Lowell*, 3 Gray, 408.

The power of the city to pass this very ordinance has been upheld in *Braun et al. v. City of Chicago*, 110 Ill. 186.

Many of the cases decided by our Supreme Court on this question were fully reviewed and approved in the elaborate opinion in the case of *Penn v. Bornman*, 102 Ill. 532. (See authorities there cited.)

The same doctrine was again re-affirmed in *Banking Co. v. Ratenberg*, 103 Ill. 460.

Our State is not alone in holding that where a statute or ordinance enacts a penalty for carrying on a particular business without a license, no action can be maintained on a contract made by one who violates the statute or ordinance. *Bensley v. Bignold*, 7 Eng. Com. Law, 188; *Downing v. Ringer*, 7 Mo. 585; *Ætna Ins. Co. v. Harvey*, 11 Wis. 412; *Williams v. Cheney*, 3 Gray, 222; *Jones v. Smith*, 3 Gray, 500; *Wood v. Armstrong*, 54 Ala. 150; *Dillon v. Allen*, 46 Iowa, 299; *Ingersoll v. Randall*, 14 Minn. 400; *Ferdon v. Cunningham*, 20 How. Pr. (N. Y.) 154; *Best v. Bander*, 29 Id. 489.

In many of the above cases the same point was urged as is urged in this case—that the object of the ordinance was to raise revenue and did not invalidate contracts.

In the case of *Johnson v. Hulings*, 103 Pa. St. 498, the court say, p. 509:

“The result follows that Johnson, in the transaction in hand, stands in the position of a real estate broker who seeks to enforce a contract which, under the statute, he had no right to make, and by the making of which he subjected himself to the penalty imposed by the statute. But a contract such as this, opposed as it is alike to good morals and public policy, can not be enforced. That has been ruled times without number.”

GARY, J. The appellant seeks to recover from the appellee compensation for services rendered in the city of Chicago, in negotiating a lease for the appellee.

The appellant had no license as a real estate broker, as pro-

Baird & Bradley v. Shipman.

vided by the ordinance copied in *Hustis v. Pickands*, 27 Ill. App. 270, and the Circuit Court ruled, intending, no doubt, to follow that case, that he could not recover.

It is not necessary to review that decision now, though an elaborate argument is made against it, as the definition which Sec. 3 of the ordinance makes of a real estate broker, excludes the kind of service for which appellant claims pay.

If the ordinance had not defined the business, but left the meaning of the words, "real estate broker," open, then the appellant might have been within them as "one who is engaged for others in negotiating contracts relative to property with the custody of which they have no concern." *Braun v. Chicago*, 110 Ill. 186. But the common council must have known that many persons are agents for owners, resident and non-resident; have the care of property, see to repairs, pay taxes, rent and collect the rents, and that all this might be with or without connection with the kinds of business mentioned in Sec. 3 of the ordinance. Consolidating, so far as affects the question here, Secs. 1 and 3, the effect is: "It shall not be lawful for any person to exercise within the city the business of * * * selling of or negotiating sales of real estate be'onging to others * * * without a license."

An argument might be spun, that the creation of an estate for years carved out of the fee, is the sale of such interest for the price of the rent to be paid, but it would be repugnant to the common understanding.

Holding that the ordinance has no application to the matter in controversy, the judgment is erroneous, and must be reversed and the cause remanded.

Reversed and remanded.

LYMAN BAIRD AND FRANCIS BRADLEY

v.

ELIAS SHIPMAN, ADMINISTRATOR.

Agency—Real Estate Agents in Complete Control—Negligence of—Agreement to Put in Complete Repair—Failure to do so—Injury to Third Person—Damages—Recovery of, from Agent.

1. If, in the exercise of his duties, an agent is intrusted with the operation of a dangerous machine, to guard himself from personal liability he must use proper care in its management and supervision so that others in the use of ordinary care will not suffer in life, limb or property. Such duty is a common law obligation, and is neither increased nor diminished by his entrance upon the duties of the agency, nor can its breach be excused by the plea that his principal is chargeable.

2. An agent in undertaking and entering upon the execution of a particular work, is bound to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts, and he can not, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to third persons who suffer injury by reason of his having so left them without proper safeguards.

3. In an action against real estate agents for the recovery of damages for the death of a third person rightfully upon premises owned by a non-resident and in their charge, it being alleged that the same occurred through the dangerous condition of a stable door thereon, this court declines to interfere with the verdict for the plaintiff.

[Opinion filed September 16, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

MR. L. H. BOUTELL, for appellants.

Agents are not liable to third persons for damages caused by their negligence.

It is an old and well established principle that an agent is not liable to third parties for damages caused by his negligence. He is so liable for misfeasance, but not for non-feasance. The reason assigned is that there is no privity between the agent and third persons. He is so liable to his principal for neglect, and the principal alone is liable to third persons. Story on Agency, Sec. 308; 3 Sutherland on Damages, p. 60; Bell v. Josslyn, 3 Gray, 309.

An apparent exception to the rule is in the case of contractors, to whom the owner of land has surrendered its possession and control during the performance of the contract. In these cases it is held that the contractor becomes, for the time being, a substituted principal, and so becomes liable to third persons for the negligence of himself or his employes.

Baird & Bradley v. Shipman.

But for the same reason that, in this class of cases, the contractor is held liable to third persons for negligence, it is also held that there is no liability on the part of the owner. *Scammon v. City of Chicago*, 25 Ill. 424; *Prairie State L. & T. Co. v. Doig*, 70 Ill. 52; *Hale v. Johnson*, 80 Ill. 185; *Kepperly v. Ramsden*, 83 Ill. 354.

But even in the case of a contractor, if the owner retains a supervisory power over the work, it is held that the owner, and not the contractor, is liable to third persons for acts of negligence. *Schwartz v. Gilmore*, 45 Ill. 455; *City of Chicago v. Joney*, 60 Ill. 387.

In the first of these cases it was held that the owner was liable for the negligence of the contractor, because the work was to be done under the supervision of the owner's architect. In the second case the owner was held liable for the negligence of the contractor, because the work was to be done under the direction of the owner's engineer.

In the case at bar, there was nothing in the relation of the appellants, Baird & Bradley, to Goodman, to take the case out of the ordinary rule applicable to principal and agent. They were merely real estate agents, having charge of this property to rent it for the benefit of the owner. Their duty to Mr. Goodman required them to rent it to the best advantage, and to that end to put it in such repair that it would so rent. They were not in the position of contractors who had the complete control of the property, but were at all times subject to the direction of Goodman the owner. The character of their agency is set forth in the stipulation in this case (Rec. 102) as follows:

"Baird & Bradley, the other defendants in this case, are real estate agents in the city of Chicago, doing a general business as such real estate agents therein, and as such were the agents of said Goodman, having the charge of said property as real estate agents, to rent the same for the said Goodman, subject to any directions he might give them from time to time concerning the same."

The principles laid down in *Schwartz v. Gilmore*, and *City of Chicago v. Joney*, are applicable to the present case. As

between Baird & Bradley and Mr. Goodman, it was undoubtedly the duty of Baird & Bradley to see that the premises when rented were in proper repair. But they did not for this purpose, have such complete possession and control of the premises that Goodman could not interfere with their actions at any time and in any way he saw fit. They never, therefore, occupied the position of substituted principals. They were merely agents, liable to their principal for neglect of duty, but not liable for such neglect to third persons.

The court was therefore in error when it instructed the jury to find Baird & Bradley guilty, if they found that Baird & Bradley "had full power and authority to make, upon said barn, all necessary and proper repairs, to keep it in good repair and condition without consulting Mr. Goodman, the owner, and that it was their duty, under their employment from Goodman to make such repairs when necessary; in short that they had full control, power and authority over said premises."

Messrs. CAMERON & HUGHES, for appellee.

GARNETT, P. J. This is an appeal from a judgment for damages founded on the alleged negligence of appellants, by which the death of Joseph Garnett, appellee's intestate, is said to have been caused. The place where the injury happened was in a barn situated on premises on Michigan avenue in Chicago, belonging to Aaron C. Goodman, who was then and for several years before, a resident of Hartford, Connecticut. Appellants were his agents for renting the premises during the years 1884 and 1885, and during both years were carrying on the real estate business in Chicago. On the trial, evidence was given tending to show that they had, in fact, complete control of the premises with the residence and barn thereon, repairing the same in their discretion, and there was no proof that in such matters they received any directions from the owner. The property was rented by appellants to Emma R. Wheeler and A. R. Tillman from April 1, 1884, to April 30, 1885, and to Emma R. Wheeler from May 1, 1885, to April

30, 1886. Both leases were in writing and by the terms of each lease the tenant covenanted to keep the premises in good repair. The tenant in the last lease rented the premises to Nellie E. Price, who occupied the same from April 28th, to September, 1885. The evidence tends to prove that when the lease was made to Emma R. Wheeler, the large carriage door to the barn was in a very insecure condition, and that appellants, through one Warner, the manager of their renting department, verbally agreed with Mrs. Wheeler to put the premises in thorough repair. Nothing was done to improve the condition of the door, and on June 12, 1885, while the deceased, an expressman by occupation, was engaged in delivering a load of kindling in the barn for one of the parties living in the house, the door, weighing about 400 pounds, fell from its fastenings and injured him to such an extent that he died the next day.

Appellants make two points: 1. That the verdict is clearly against the weight of the evidence. 2. That they were the agents of the owner, Goodman, and liable to him only for any negligence attributable to them. There is nothing more than the ordinary conflict of evidence found in such cases, presenting a question of fact for the jury, and their finding must be respected by this court in deference to the well settled rule.

The other point is not so easily disposed of. An agent is liable to his principal only for mere breach of his contract, but even in the performance of the duties imposed upon him by contract with his principal, he must have due regard to the rights and safety of third persons. He can not in all cases find shelter behind his principal. If, in the course of his agency, he is intrusted with the operation of a dangerous machine, to guard himself from personal liability, he must use proper care in its management and supervision, so that others in the use of ordinary care will not suffer in life, limb or property. *Swydam v. Moore*, 8 Barb. 353; *Phelps v. Wait*, 30 N. Y. 78.

It is not his contract with the principal which exposes him to, or protects him from, liability to third persons, but his common law obligation to so use that which he controls as not

to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. *Delaney v. Rochereau*, 34 La. An. 1123.

If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he can not, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to a third person who suffers injury by reason of his having so left them without proper safeguard. *Osborne v. Morgan*, 130 Mass. 102.

A number of authorities charge the agent, in such cases, on the ground of misfeasance as distinguished from non-feasance. Mechem in his work on Agency, Sec. 572, says: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between non-feasance and misfeasance. As has been seen, the agent is not liable to strangers for the injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal and imposed upon him by his relation, which is non-feasance. Misfeasance may involve, also, to some extent, the idea of not doing; as where the agent, while engaged in the performance of his undertaking, does not do something which it was his duty to do, under the circumstances; does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing; it is not the not doing of that which is imposed upon the agent merely by virtue of his relations, but of that which is imposed upon him by law as a responsible individual in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation." To the same effect are *Lottman v. Barnett*, 62 Mo. 159; *Martin v. Benoist*, 20 Ill. App. 263; *Harriman v. Stowe*, 57 Mo. 93; *Bell v. Joselyn*, 3 Gray, 309.

A case parallel to that now in hand is *Campbell v. Portland Sugar Co.*, 62 Me. 552, where agents of the Portland Sugar

Company had the charge and management of the wharf belonging to the company, and rented the same to tenants, agreeing to keep it in repair. They allowed the covering to become old, worn and insecure, by means of which the plaintiff was injured. The court held the agents were equally responsible to the injured person with their principals.

Wharton in his work on Negligence, Sec. 535, insists that the distinction, in this class of cases, between non-feasance and misfeasance, can no longer be sustained; that the true doctrine is, that when an agent is employed to work on a particular thing, and has surrendered the thing in question into the principal's hands, then the agent ceases to be liable to third persons for hurt received by them from such things, though the hurt is remotely due to the agent's negligence; the reason being that the causal relation between the agent and the person hurt is broken by the interposition of the principal, as a distinct center of legal responsibilities and duties, but that wherever there is no such interruption of causal connection, and the agent's negligence directly injures a stranger, the agent having liberty of action in respect to the injury, then such stranger can recover from the agent damages for the injury. The rule, whether as stated by Mechem or Wharton, is sufficient to charge appellants with damages under the circumstances disclosed in this record. They had the same control of the premises in question as the owner would have had if he had resided in Chicago and attended to his leasing and repairing. In that respect appellants remained in control of the premises until the door fell upon deceased. There was no interruption of the causal relation between them and the injured man; they were, in fact, for the time being, substituted in the place of the owner, so far as the control and management of the property was concerned. The principle that makes an independent contractor, to whose control premises upon which he is working are surrendered, liable for damages to strangers caused by his negligence, although he is at the time doing the work under contract with the owner (Wharton on Neg., Sec. 440), would seem to be sufficient to hold appellants. The owner of cattle who places them in the

hands of an agister is not liable for damages committed by them while they are under control of the agister. It is the possession and control of the cattle which fix the liability, and the law imposes upon the agister the duty to protect strangers from injury by them. *Ward v. Brown*, 64 Ill. 307; *Osborn v. Adam*, 70 Ill. 291.

When appellants rented the premises to Mrs. Wheeler in the dangerous condition shown by the evidence, they voluntarily set in motion an agency which, in the ordinary and natural course of events would expose persons entering the barn to personal injury. Use of the barn for the purposes for which it was used when the deceased came to his death, was one of its ordinary and appropriate uses, and might, by ordinary foresight, have been anticipated.

If the insecure condition of the door fastenings had arisen after the letting to Mrs. Wheeler, a different question would be presented, but as it existed before and at the time of the letting, the owner or persons in control are chargeable with the consequence. *Gridley v. Bloomington*, 68 Ill. 47; *Tomle v. Hampton*, Supreme Court of Illinois, Opinion filed at Ottawa, June 15, 1889. Neither error is well assigned, and the judgment is affirmed.

Judgment affirmed.

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HORACE N. HARRIS

v.

ELLEN BRAIN AND WILLIAM E. BRAIN.

Trover—Action of—Parties—Husband and Wife—Property in Wife Alone—Practice—Bills of Exception—Insufficiency of—Chattels—Exchange of—Fraudulent Representations.

1. Joinder of husband and wife in an action of trover for property belonging to the wife alone, is improper.
2. Exhibits written on sheets succeeding the signature of the judge instead of being incorporated in the bill of exceptions, constitutes no part thereof.
3. A vendee has no right to rely upon general words of praise on the part of the vendor.

[Opinion filed September 16, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. TURNER & MOORE, for the appellant.

Messrs. LONG & HUTCHINSON, for the appellees.

GARNETT, P. J. Allusion has several times been made in the opinions of the Appellate and Supreme Courts, to the loose practice of referring, in a bill of exceptions, to exhibits, written on sheets succeeding the signature of the judge, instead of incorporating them in the bill, but appellant has not been deterred from pursuing that course, although several cases may be found where a hearing on the merits has been prevented, solely by that practice. The words and figure "Exhibit I, here offered and admitted in evidence," is not a sufficient identification of a document marked, "Exhibit I," which precedes the title page to the bill of exceptions, or follows the signature of the judge. Numerous documents were offered in evidence in the trial of this case in the Circuit Court, and all but one of them are identified in that way only. It is needless to say that these constitute no part of the bill of exceptions. If appellant had to rely on these documents, which he has thus ineffectually sought to bring before us, his appeal would necessarily fail. Another error assigned is, however, fatal to the judgment. The action being trover, brought by Ellen Brain and William E. Brain, her husband, it appeared on the trial from plaintiff's own evidence that the property, alleged to have been converted, was the separate property of the wife, and that the husband had no interest therein. Joinder of the husband and wife in such case is clearly error. *City v. Speer*, 66 Ill. 154; *Hennies v. Vogel*, 66 Ill. 401; *C. & B. & Q. R. R. Co. v. Dickson*, 67 Ill. 122; 1 Chitty Pl. 66.

It is charged by appellees, that in a proposed exchange between themselves and appellant, the latter gained possession of the goods in question by means of false and fraudulent

representations concerning the property he was to give them in the transaction. We find nothing in the representation concerning the property he was to give them in the transaction. We find nothing in the representations exceeding the bounds of commendation which the law tolerates in a vendor. No matter of fact was falsely stated, and appellees had no right to rely upon general words of praise.

There may be doubt whether the goods were delivered to appellant under the contract, or merely by way of temporary accommodation, and that question can be fairly submitted to a jury at the next trial, if appellees shall see fit to dismiss William E. Brain out of the case.

The judgment is reversed and the case remanded.

Reversed and remanded.

JOHN C. SIMONDS

v.

EMILY S. P. ALLEN.

Husband and Wife—Marriage—Bill to Declare Void—Divorce in Another State—Re-marriage—Rule in New York.

1. It is a rule of law in the State of New York, that a decree of divorce obtained in another State against one who, at the time it was rendered and during the pendency of the proceeding was domiciled in New York, and who was not personally served with process, and did not appear in the action or proceedings, is wholly inoperative and void, so far as relates to the defendant in such divorce proceeding.

2. The presumption is, that a contract of marriage is to be performed in the place in which the parties to it are domiciled at the time the marriage is performed, and the capacity of each party to enter into a valid contract must be determined by the law of the place of the marriage.

3. A marriage, invalid at the place it was entered into, must be held invalid wherever the question of its validity is raised for determination.

4. Upon the introduction of the decisions of another State, showing the rule of law therein touching certain cases, it is proper for the court to determine the validity of a marriage contracted in that State by the law thereof.

Simonds v. Allen.

5. Upon a bill filed praying that a marriage which had been performed in another State should be declared void, this court holds that the ceremony in question was a mere form, and that the trial court erred in dismissing said bill.

[Opinion filed October 23, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

MESSRS. JOHN C. SIMONDS, *pro se*, EDWARD MAHER and GEORGE A. GARY.

No appearance for appellee.

MORAN, J. Appellant filed his bill in the Superior Court, praying that a marriage, which had been performed between him and the appellee in the State of New York, be declared void. An affidavit that appellee was a non-resident of this State, and that she was a resident of the State of New York, was filed, and proof of service upon her in the State of New York of a certified copy of the bill of complaint, and a notice, as required by statute, was made, and her default regularly entered. On hearing the evidence introduced by appellant in support of his bill, the chancellor refused the decree and ordered the bill dismissed, and to reverse such order this appeal is prosecuted.

The facts as alleged in the bill and proved by the evidence are as follows:

A marriage ceremony was performed between appellant and appellee in the city of Rochester and State of New York, on the 27th day of January, 1877, and the parties lived and cohabited as husband and wife in the said State for some years thereafter. At the time of said marriage appellant knew that appellee had been before married to a man named Allen, but was informed by appellee that her said husband, Allen, had been dead some eight years. In December, 1886, appellant ascertained that Allen was alive and a resident of Flint, Michigan. Appellee was married to Jerome Allen in Cayuga county, State of New York, in 1852, and lived with him as

his wife fourteen years. In 1868, while living in the city of Auburn, New York, she deserted her said husband, Jerome Allen, and thereafter they never lived together. Appellee continued to reside in the State of New York, but said Jerome Allen removed from said State in 1869 and located in the State of Michigan, where he was living at the date of appellant's marriage to appellee, and where he still resides. In 1872 said Jerome Allen instituted, in the Superior Court of the City of Detroit, a suit for divorce from appellee. In said suit service was by publication only. She was not personally served with process or notice either in Michigan or New York, and did not appear either in person or by attorney. At the time of said divorce proceeding she was a resident of the State of New York, where she had continued to live from the time she deserted said Allen, and she was not at any time a resident of the State of Michigan. Default was entered against her in the proceeding in Detroit, and the court, after hearing evidence in support of the bill, rendered a decree of divorce. As soon as appellant learned that Allen was alive he ceased living with appellee, and shortly thereafter, on ascertaining the facts above set forth with reference to the Detroit divorce, he instituted his suit for relief, praying to have the said marriage with appellee declared void *ab initio*.

It has been maintained, as the law of the State of New York, by a consistent line of decisions of the highest courts of said State, running through a period of more than seventy years, and commencing with the case of *Borden v. Fitch*, 15 Johns. 121, and finding the latest expression, so far as we are advised, in *Cross v. Cross*, in 108 N. Y. 629, that a decree of divorce obtained in another State against one who, at the time it was rendered and during the pendency of the proceeding, was domiciled in the State of New York, and who was not personally served with process, and did not appear in the action or proceeding, is wholly inoperative and void, so far as relates to the defendant in such divorce proceeding. In *The People v. Baker*, 76 N. Y. 78, the defendant, who was indicted for the crime of bigamy, offered in evidence an exemplified copy of

the record of judgment in the Court of Common Pleas of the County of Seneca, State of Ohio, in a proceeding against him by his first wife for divorce, in which, before he married the second wife in New York, a decree was entered, purporting to dissolve the first marriage. The record shows proof of service on the defendant by publication, and no personal appearance by him. Prior to the commencement of said judicial proceedings in Ohio the defendant resided at Rochester, in the State of New York, and he continued to reside there until after the decree of divorce was rendered, and there was no pretense that defendant was domiciled in Ohio, or temporarily abiding there at any time during the pendency of the divorce proceedings. The record was excluded, so far as it was offered to prove the dissolution of the prior marriage, and the defendant was convicted, and the conviction sustained by the Court of Appeals, on the ground that the Ohio decree of divorce was without effect upon the status of the defendant in New York, and that notwithstanding said decree, his marriage to a second wife while his first wife was living, was a crime. *O'Dea v. O'Dea*, 101 N. Y. 23, was, as this case is, a suit by the husband to have the marriage declared void, upon the ground that at the time it took place a former husband of the defendant was living, and the marriage with him was in full force. The proof was that the defendant married her former husband in New York, and lived with him in that State till 1860, when she left him and returned to her former home in Canada, where she continued to reside until 1865; that said former husband left New York and became a resident of the State of Ohio where, in March, 1864, after a residence of more than one year, he commenced a proceeding for divorce from the defendant, on the ground of desertion; that copy of the petition for divorce and of the summons issued thereon were sent by mail to the defendant, at Toronto, Canada, in March, 1864, and were received by her; that in April, 1864, depositions in said divorce proceeding were taken in Toronto on notice to defendant, and she was present at the taking thereof, but took no part in person or by counsel. She never in any way appeared in the proceeding in Ohio.

A decree was granted by the Ohio court, dissolving the marriage, and after the entry of said decree the defendant married the plaintiff, who knew when the marriage occurred that defendant had been a wife, and was not a widow, and also knew of the Ohio divorce proceedings during its pendency, and of its result. The former husband was living in Ohio at the time of the marriage of plaintiff and defendant. It was held that the Ohio court had acquired no jurisdiction over the defendant; that the decree of divorce was as to her inoperative and void; that her former marriage was still in full force, and therefore her marriage with the plaintiff was illegal and void.

These cases serve to illustrate the strictness with which the rule is adhered to in New York, and the severity with which it is administered, and they make it clear that if appellant was seeking in that State the same relief against the marriage with appellee that he is seeking here, it would undoubtedly be afforded to him.

Having become a resident of this State, is he not entitled to the same relief here that he might obtain by application to the courts of the State in which the marriage contract, alleged to be void, was made?

It must be noted that the question is not, what force and effect might be given to the Michigan divorce, if the inquiry arose in relation to the status of one of the parties to that proceeding, who should afterward contract marriage in this State. We are not called upon to determine the validity of the Detroit divorce; our inquiry relates to the validity of the New York marriage.

The law regards marriage as creating a status. The status is based upon the contract of the parties, and the validity of the contract is determined by the law of the place where the contract is made. The *lex loci contractus* is the test of the validity of all contracts, unless it appears that the contract is to be performed in some other jurisdiction. The presumption is, the contract of marriage is to be performed in the place in which the parties to it are domiciled at the time the marriage is performed, and the capacity of each party to enter into a

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valid contract must therefore be determined by the law of the place of the marriage. *Warrender v. Warrender*, 2 Cl. & F. 536; *Schreck v. Schreck*, 32 Tex. 587.

It is shown that the parties to the marriage in question were domiciled in New York, and that the marriage ceremony was performed there, and if, by the law of that State, it was unlawful for one of the parties to intermarry, the marriage was invalid, and if invalid, for such reason, at the place where the contract was made, it must be held invalid wherever the question of its validity is raised for determination.

Complainant on the hearing in the court below introduced the New York decisions in evidence. The law of New York was thus proved to the court, and it was the duty of the court to determine the validity of the New York marriage by the New York law.

As we have seen, by that law appellee had another husband living at the time she contracted the marriage with appellant, and she was incapacitated to contract such marriage and in doing so committed an offense against the State.

Such marriage was in fact and effect nothing but a mere form; as a contract or as creating the status of marriage between the parties, it was an absolute nullity. We think it clearly within the power of the court to grant the relief prayed by the bill, and that it was error to dismiss the bill for want of equity. The decree of the Superior Court will, therefore, be reversed and the case remanded to that court, with directions to enter a decree in conformity with the prayer of the bill.

Reversed and remanded.

CHARLES B. PROUTY, ASSIGNEE, ET AL.

v.

EMMA B. HANFORD AND HARRY EATON.

Writ of Error—Judgment by Confession—Notes—Consideration—Assignment—Preference—Trust—Evidence—Costs.

1. If there be a dissolution of a partnership, and the remaining partner takes all the assets, and agrees with the outgoing partner to pay all the debts, the partnership debts have no preference over the individual debts

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of the remaining partner in the disposition of the assets which before the dissolution, were the assets of the partnership.

2. Upon a writ of error brought to reverse a decree of the Circuit Court rendered on an appeal from the County Court upon a petition filed in voluntary assignment proceedings, to declare void the alleged lien of executions issued upon judgments by confession in favor of the defendants, and against said insolvent, as against her property in the hands of her assignee, and to postpone and preclude said defendants from receiving any dividend out of said property until *bona fide* creditors should be paid, this court holds that the entering up of said judgments by confession, the levying of the executions on said property, and the making of the voluntary assignment by the insolvent were all part and parcel of one transaction by which she divested herself and intended to divest herself of all dominion over her property; that defendants should be paid *pro rata* with the other creditors, the amounts due them, and that no costs be recovered by either party from the other, but each to pay their own.

3. Notes accepted by children after attaining their majority, from their mother, the same covering their shares of their father's estate, in the absence of evidence going to show that they were not given with honest intent, will be considered as being based upon a sufficient consideration.

[Opinion filed October 23, 1889.]

IN ERROR to the Circuit Court of Cook County; the Hon OLIVER H. HORTON, Judge, presiding.

Messrs. WEIGLEY, BULKLEY & GRAY, for Chicago Shot Tower Co., and Charles B. Prouty, assignee.

Mr. JAMES H. FAIRCHILD, for Hibbard, Spencer, Bartlett & Co., Winchester Repeating Arms Co., Union Metallic Cartridge Co. and Hartley & Graham.

Mr. CHARLES S. THORNTON, for Du Pont & Co., Hazard Powder Co. and Chicago Fireworks Co., BAYLEY & WALDO, for S. Westwood & Co.

Partnership property is a fund or estate held for the purpose of the partnership as a separate and distinct entity. The interest of a partner therein is only a claim against the floating balance or surplus which may remain after the payment of the firm debts. *Trowbridge v. Cross*, 7 N. E. Rep. 347; *Rosenstiel v. Gray*, 112 Ill. 288.

The interests of Mrs. Burgess and her two children in the property in question, were joint, and so far as the property

was concerned they were partners. It is analogous to a limited or special partnership, and the rights of Mrs. Burgess and her two children are similar to the rights of a general and two special partners; that is, the property invested in trade liable for all the debts before either of the partners can obtain a share, and only the general partner liable personally.

As to persons who never had any business transactions with the firm, notice by publication is sufficient; but as to those who have actual dealings with the firm, actual notice, or its equivalent, must be shown in order to release a retiring partner from liability. *Meyer et al. v. Krohn et al.*, 114 Ill. 585.

The distinguishing characteristic of a partnership is the sharing in profits and losses. *Wilcox et al. v. Doga et al.*, 12 Ill. App. 517.

Where a partner buys out his copartners, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts just as before the sale. The lien of the firm creditors attaching must be preferred to the lien of an individual creditor of the remaining partner attaching first. *Conroy v. Woods et al.*, 13 Calif. 626; *Phelps v. McNeely*, 66 Mo. 554; *Calender v. Robinson*, 96 Pa. St. 454.

Where an act is done or a statement made by a party which can not be contradicted or contravened without fraud on his part and injury to others whose conduct has been influenced thereby, an estoppel arises. *Voge v. Breed et al.*, 14 Ill. App. 545; *International Bank v. Bowen*, 80 Ill. 545.

If a wife advance her husband funds, for the purpose of carrying on a general trade, although in the wife's name, the entire capital including increase will be liable for the debts of the husband. *Wilson et al. v. Loomis et al.*, 55 Ill. 352; *Robinson v. Brems et al.*, 90 Ill. 351; *Patton v. Yates*, 67 Ill. 164; *Hockett v. Bailey*, 86 Ill. 77; *Miller v. Payne*, 4 Ill. App. 118.

Where one, having a right or interest by his conduct, influences another to act on the faith of its non-existence or that it will not be asserted, he shall not be allowed to afterward maintain it to the prejudice of those so acting: *McGovern v. Knox*, 21 O. St. 547; *Roy v. McPherson*, 11 Neb. 197; *Anderson v. Armsted*, 69 Ill. 454.

Definition of "Insolvency": When a concern has not property enough to pay its debts. *McArthur v. Chase*, 13 Gratt. 694.

An indebtedness created for the benefit of a trust estate is a charge on the same and may be collected therefrom. *Moore v. Lambkin Tr.*, 63 Ga. 748; *Wylly v. Collins*, 9 Ga. 233; *Dyett v. N. A. Coal Co.*, 20 Wend. 571; *S. C. 7 Paige*, 9.

Debts contracted by a trustee upon the faith of the trust estate, are a charge upon such estate. *Noyes v. Blakeman*, 6 N. Y. (2 Seld.); *Firemen's Ins. Co. v. Bays et al.*, 4 Barb. 407; *Frazer v. Brownlow*, 3 Ired. Eq. 237; *Cater v. Everleigh*, 4 Desaus. 19; *James v. Mayrant*, 4 Desaus. 589; *Ex parte Richardson*, 3 Madd. 157; *Montgomery v. Everleigh et al.*, 1 McCord, 154, 207; *Willis v. Sharpe*, 21 N. E. Rep. 705.

In the last case mentioned it appeared that the goods had been purchased by one who had rented the estate and were for his own individual use and not for the benefit of the trust estate. He had, prior to that time, been active manager of said estate. No notice was given to the creditor from whom he purchased that he was buying them for his own individual use. A credit was given on the faith of the trust estate, and, the purchaser being insolvent, the estate was held liable.

An exact duplicate of this exists in the case at bar. All of the trade debts of the insolvent were created on the faith of the trust estate.

Beneficiaries can take nothing until all trade debts are paid in full. *Ex parte Garland*, 10 Ves. Jr. 110; *Thompson v. Andrews*, 1 Myl. & K. 116; *Ferry v. Laible*, 31 N. J. Eq. 576.

A mother is under no legal obligation to support her child, so long as the father is living, or the child has an estate of its own or is able to support itself. *Mowbry v. Mowbry*, 64 Ill. 383; *Pray v. Gorham*, 31 Me. 240; *Commonwealth v. Murray*, 4 Binn. 487; 1 Blackstone Comm., 453; *Passgr. Ry. Co. v. Stuttler*, 54 Pa. St. 375; 1 Parsons on Contracts, *308.

A father died intestate, leaving an estate to his widow and his two minor children. Held, that the mother will be allowed out of the portion of the estate belonging to the children

for their maintenance, and this for time past as well as time to come. *Wilkes v. Rogers*, 6 Johns. 566; *Hayward v. Cuthbert*, 4 Desans. 445; *Osborn v. Van Horn et al.*, 2 Fla. 260.

And where real and personal property was left to a widow and her two minor children in certain proportions, the widow was not held liable for the payment of rent of the children's portion of the real estate, she having supported them, the point of the decision being that it was joint property used for the benefit of the joint owners and neither party could recover from the other. *Hatch v. Hatch*, 13 At. Rep. 791.

Nor is a step-father bound to support the children of his wife by a former husband. *Attridge v. Billings*, 57 Ill. 489; *Meyer v. Temme*, 72 Ill. 554.

And courts will even make appropriations out of the child's estate in some instances where the father is living and has means with which to support the child. *Jervoise v. Silk*, *Cooper's Ch.* 52.

And always where he has not the means. *Newport v. Cook*, 2 Ashm. 332; *Ex parte Green*, 1 Jac. & W. 253; *Carter v. Rolland*, 11 Humph. 339.

Even a father, standing in the same position or relation to his two children as Mrs. Burgess did in this case, would not be held liable to account for profits on their estate used by him in maintaining, supporting and educating them, much less a mother. *Fuller v. Fuller*, 2 So. Rep. 430.

The guardian of an infant ward living in his family, can charge for board and clothing, though the ward be a near relative and though another member of the family offered to board her for nothing. *Moyer v. Fletcher*, 56 Mich. 508.

Where the same person is both executor and guardian, he can not be held liable as guardian, until his accounts as executor show a transfer to his account as guardian. *Conkey v. Dickinson*, 13 Metc. 51; *Alston et al. v. Mumford et al.*, 1 Brock. (U. S.) 266, and note on page 278 of said report; *Burton v. Tunnel*, 4 Harr. 424.

He can not be held liable in both capacities. *Wrenn et al. v. Grayden*, 1 How. (Miss.) 365; *Forteaux v. LePage*, 6 Ia. 123.

An executor who is also guardian should first settle his account as executor and then transfer the balance to the guardianship account. Schouler's Dom. Rel., 373; Conkey v. Dickinson, 13 Metc. 51.

Mrs. Burgess never having filed her bond or obtained her commission as guardian from the Probate Court, according to the statute, never became, in fact, the guardian of her children, but held the property from and after her husband's death and until the date of the failure, as executrix. Secs. 5, 8 and 9, Ch. 64, title, Guardian and Ward, Rev. S. Ill.; Wadsworth v. Conell, 104 Ill. 369.

If any creditor of an insolvent debtor, contemplating an assignment, obtain a preference by or through the connivance or assistance of such debtor, the preference will be void as being within the voluntary assignment law prohibiting preferences. P. C. Hanford Oil Co. et al. v. First. Nat. Bk. of Chicago, 21 N. E. Rep. 483; Preston v. Spaulding, 120 Ill. 208; White v. Cotzhausen, 9 S. C. Rep. 309.

Affirmative relief can not be granted defendant on an answer. Ballance v. Underhill, 3 Scam. 452; Rowan v. Bowles et al., 21 Ill. 17; Hanna v. Ratekin, 43 Ill. 462.

Mr. MATTHEW P. BRADY, for defendants in error.

The case *In re Johnson* (Shearman v. Robinson), 15 Law Reporter, Chancery Division, page 548, is in its facts almost identical with this case on the point now under consideration. It appeared from the evidence that an executor carried on the business of the testator under the terms of the will in his own name. In carrying on one branch of the business he received £764 16s. 1d. more profits than he accounted for to the beneficiary under the will, who was an infant son of testator, and in carrying on another branch of the business he received from it and other sources £1,668 3s. 1d. more than he accounted for. Various creditors who had supplied goods to the executor while carrying on the business, sought to have their claims paid out of the assets of the business, on the ground that they had a lien on the assets which gave them priority over the claim of the beneficiary under the

Prouty v. Hanford.

will. It was held that the creditors were not entitled to a lien on the assets of the business, nor to priority over the claim of the beneficiary for the amount for which the executor was in default to them, because the executor, being in default to the estate, was not entitled to indemnity, and the creditors stood in his place. The grounds of the decision are stated succinctly in the syllabus thus:

“Where a trader has by his will directed his executor or trustee to carry on his trade and to employ a specific portion of the trust estate for the purpose, the rule is, that though the executor or trustee is personally liable for debts incurred by him in carrying on the trade pursuant to the will, he has the right to resort for his indemnity to the specific assets so directed to be employed, but no further. And, consequently the creditors of the trade are entitled to stand in the place of the executor and trustee, and to claim the benefit of that right so as to obtain payment of their debts. But the rule does not apply where the executor or trustee is in default to the specific trust estate devoted to the trade. In such a case, the defaulting executor or trustee not being himself entitled to an indemnity except upon terms of making good his default, the creditors are in no better position, and are, therefore, not entitled to have their debts paid out of the specific assets unless the default is made good.”

GARY, P. J. In 1870 Charles A. Eaton died; at the time of his death he was a partner in the mercantile firm of Eaton & Abbey. By his will he left it to the discretion of his widow, Emma E., since re-married, and now Burgess, to continue the assets of his estate in the business. Very soon after his death she bought out the partner Abbey, mainly with the proceeds of insurance on the life of her husband, and thereafter conducted the business in her own name as E. E. Eaton.

By the will of her husband, the shares in his estate of her two children, the defendants in error, Emma B. Hanford and Harry Eaton, then both minors, were something less than \$6,000 each. Both children lived with, and were supported and educated by their mother.

In April, 1885, the daughter being about to marry and the son nearly of age, they all met at the office of Messrs. Grant & Brady, attorneys, and the mother and children agreed upon the terms of making her notes for \$6,000 to each of the children, in full of all their respective claims.

The note to the daughter was then executed; that to the son was deferred to the following December, when he became of age. Both were judgment notes. These notes were left with plaintiff in error, Prouty, who was then, and continued thereafter to be, so long as the business continued, the business manager of Mrs. Burgess. April 21, 1886, the husband of the daughter applied to Prouty and received a statement of the condition of Mrs. Burgess affairs. Not liking that condition, he told his wife to take her note to Grant & Brady, and do as they advised, and that his judgment was, that judgment should be entered upon the notes. April 22, 1886, Mrs. Burgess, Prouty, Mrs. Hanford and the son, all met at the office of Grant & Brady; judgments were entered upon the notes, executions issued and levied upon all the property of Mrs. Burgess. The next day Mrs. Burgess made a general assignment to Prouty, and by agreement a few days after, the property levied upon by the sheriff was delivered to the assignee, preserving liens. The plaintiffs in error now claim:

First: That the property employed in said business under the name and style of E. E. Eaton, being trust property, in part at least, the rights of trade creditors to be paid out of the proceeds of said property so employed in said business, are superior to the rights of the beneficiaries of said trust.

Second: That the promissory notes given by the insolvent, Emma E. Burgess, to Emma B. Hanford and Harry Eaton were without consideration and therefore void as to creditors.

Third: That the entering up of said judgments by confession, the levying of the executions on said property, and the making of the voluntary assignment by the said insolvent, were all part and parcel of one transaction by which she divested herself and intended to divest herself of all dominion over her property.

As to the first point, it has not been deemed necessary to

attempt to ferret out from this record what portion of the indebtedness of Mrs. Burgess which existed at the time of the assignment, existed at the date when the notes were given.

If the theory of the plaintiffs in error were correct, it could only apply to that class of indebtedness.

But the theory is not correct. By the settlement between Mrs. Burgess and her children all the assets of the business became her own in law and equity, and subject to her disposition.

The case of *Ladd v. Griswold*, 4 Giln. 25, followed under very provoking circumstances in *Hapgood v. Cornwell*, 48 Ill. 64, and approved in *Goembel v. Arnett*, 100 Ill. 34, establishes the law of his State, that if there be a dissolution of partnership, and the remaining partner takes all the assets and agrees with the outgoing partner to pay all the debts, the partnership debts have no preference over the individual debts of the remaining partner in the disposition of the assets which were, before the dissolution, the assets of the partnership. If, as to a formal acknowledged partnership, this be correct doctrine, it applies with greater force to this case, where the interests of the children, whatever its character, was silent and secret, and they were never held out to the world as having any interest. When that settlement was made the parties were all capable, under the law of this State, to make such contracts with reference to the business then in hand as they could agree upon.

The second point is not well taken. The defendants in error took their mother's notes in full of their claims upon her. If that was with honest intentions, which will be presumed unless there is something shown to the contrary, the claims thereby adjusted and liquidated were good and sufficient consideration for the notes, creating debts of fixed amounts against her.

To impeach, as for fraud against other creditors, a note given by the remaining partners to an outgoing partner for his interest in a firm not able to pay its debts, there must be proof of a fraudulent design. *Blow v. Gage*, 44 Ill. 208. The principle is applicable here.

The third point is sustained by the evidence. On the whole evidence it is apparent that the mother and children left all their interests in their pecuniary relations with each other, jointly and severally, with and to the discretion of Grant & Brady. They were intrusted by all with the authority to devise any plan that recommended itself to their judgment.

At that time the doctrine of *Preston v. Spaulding*, 120 Ill. 208, had not been announced. It was supposed by the legal profession generally, that a judgment by confession and levy under an execution issued upon it would take precedence of an assignment for the benefit of creditors following immediately, and that no connection between them would have the effect to make the judgment void as an unlawful preference. The judgment of the Circuit Court directing the payment in full of the executions in favor of the defendants in error will therefore be reversed and the cause remanded to the Circuit Court, with directions to order that the defendants in error be paid *pro rata* with the other creditors, the amounts due upon their respective notes, without costs, made by entering judgment, etc. And that no costs be recovered by either party from the other at any stage of this litigation, but each pay all their own.

Reversed and remanded.

MORAN, J., does not concur in so much of the opinion as holds that the judgments were an unlawful preference.

MAURIA L. J. JOHNSON

v.

ALFRED B. MCCHESNEY.

Real Property—Title—Cloud—Bill to Remove—Sale upon Installments—Failure to Pay—Retention of Payments as Liquidated Damages—Recording Contract.

1. Only the owner of land can ask to have a cloud removed from the title thereof.

Johnson v. McChesney.

2. Costs and expenses incurred by an owner in such a proceeding can not ordinarily be recovered from his grantor on any of the covenants usually found in warranty deeds.

3 The general rule that a bill to remove a cloud can only be maintained when the complainant is in possession, or the land is unimproved and unoccupied, is subject to the exception that, when there is no adequate remedy at law, equity gives relief.

4. It *seems* that the owner of real property can not, subsequent to a conveyance thereof, maintain a bill to remove a cloud from the title, even if he warranted the same.

[Opinion filed October 23, 1889.]

APPEAL from the Superior Court of Cook County; the
HON. HENRY M. SHEPARD, Judge, presiding.

Mr. JOHN GIBBONS, for plaintiff in error.

Mr. GRANVILLE W. BROWNING, for defendant in error.

GARNETT, J. On March 1, 1881, a contract was made by the defendant in error with plaintiff in error, to sell her two lots in Cook county, for the sum of \$450, to be paid in installments. The sum paid is in dispute, but it was either \$90 or \$100. The contract made time of its essence, and authorized McChesney, at his option, to declare a forfeiture for the failure in payment of an installment, and in that event to retain all payments as liquidated damages. The purchaser filed the contract for record and failed to pay any installment after the first. After such failure McChesney tendered her a warranty deed, on June 30, 1886, and demanded compliance by her with the contract; she still neglecting to make any additional payment, he filed the bill in this case, to remove from the title the cloud caused by the recording of the contract.

The bill alleges that McChesney is seized in fee simple of the premises; but it appears from his own testimony that he had sold and conveyed the lots to some other person before the bill was filed, thus disproving one of the material allegations of the bill. Only the owner of the land can ask to have a cloud removed from the title. Gage v. Stokes, 125 Ill. 41; Huntington v. Allen, 44 Miss. 654.

If that which is assailed is nothing more than a cloud, the owner is the only person interested in having the fact judicially found; he, being content to allow the cloud to remain, no complaint should be heard from any other source. If, in a suit in equity to remove the cloud, he incurs costs and expenses (other than the amount which equity may require to be paid to his adversary), he can not recover them from his grantor on any of the covenants usually found in warranty deeds. Rawle on Covenants (5th Ed.), Sec. 201; 2 Sutherland on Damages, 308. A complainant who voluntarily parts with his title after filing his bill and before hearing on the merits, loses his right to proceed to a decree. *Smith v. Brittenham*, 109 Ill. 540. He certainly can be in no better position if he disposes of his title before commencing suit. Whether appellee's conveyance was with or without covenant is not stated in this record. Even if he warranted the title, there is respectable authority denying his right to maintain a bill to remove the cloud. *Bissell v. Kellogg*, 60 Barb. 617.

While the rule announced in the last case cited has not, so far as we are aware, been approved by the Supreme Court of this State, it was held in *Smith v. Brittenham*, *supra*, that the effect of complainant's covenant could not be considered, as the bill proceeded upon the theory of ownership, and not on the theory of his liability on any covenant. Here, as there, the bill proceeds upon the allegation that McChesney is the owner in fee, no reference being made therein to any conveyance by him.

In the decided cases it is frequently said, in general terms, that a bill to remove a cloud can only be maintained when the complainant is in possession, or the land is unimproved and unoccupied. To this general rule there is an exception, namely, that when there is no adequate remedy at law equity gives relief. Illustrations of the exception are found in *Mitchell v. Shortt*, 113 Ill. 252; *Shays v. Morton*, 48 Ill. 100; *Holden v. Holden*, 24 Ill. App. 106.

In all three of these cases the defendants were in possession, but as an action of law would not settle such titles, a bill to quiet title was held maintainable. In this case it is manifest that a judgment for appellee, in an ejectment suit brought by

Wilson v. Bean.

him against appellant, would not be decisive of her equitable interest under the contract. Hence, if all the other conditions were favorable to the complainant, the absence from his bill, of an averment that he was in possession, or that the premises were unimproved and unoccupied, would present no ground for denying the relief prayed.

The record presents a serious question, upon which we have received from counsel no assistance, either by way of argument or citation of authority, to wit: Will equity give complainant the relief desired, unless he refunds the money received by him under the contract? Upon that question we deem it wise not to pass without first hearing argument, and the suggestion is made in view of the fact that if the bill is amended by making the owner of the lots complainant, then, upon appeal from another decree of the court below, this point is liable to be presented.

The decree being in conflict with the rule herein announced, is reversed and the case remanded.

Reversed and remanded.

MILTON H. WILSON ET AL.

V.

DIXON BEAN.

Limited Partnerships—Special Partner—Certificate—Statute of Colorado—Liability as General Partner—Evidence.

1. The purpose of requiring a certificate of the amount of capital contributed by a special partner, is to enable those who may deal with the firm to estimate the credit that may be prudently extended to it, and it is strictly just that they shall be able to make such estimate with the greatest possible accuracy.
2. The certificate of a special partner which sets forth that he contributed goods to the value of a certain amount, the fact being that an indebtedness was paid him by the firm during the continuance thereof, must be looked upon as sufficiently misleading and deceptive to render its maker liable as a general partner to creditors of the firm.

[Opinion filed October 23, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

MESSRS. FLOWER, REMY & HOLSTEIN, for appellants.

MESSRS. BISBEE, AHRENS & DECKER, for appellee.

MORAN, J. This action was brought to recover from appellee, as a general partner, for goods sold and delivered to the firm of C. L. De Mange & Co., which was organized as a limited partnership under the statute of Colorado. A special partnership may be formed under the law of that State by the special partners contributing, instead of money, property at a cash value, and the certificate required by the statute to be signed by the partners must state the amount of money, or property at cash value, contributed by the respective special partners.

The certificate of organization of the special partnership signed by appellee, stated that his contribution to the capital stock was "the sum of two thousand six hundred and thirty-five and eighty-six one hundredths dollars, in merchandise of the full cash value, of the said sum." The evidence shows that what was contributed was certain merchandise which had belonged to a prior firm, the value of appellee's interest in which was estimated to be the sum named in the certificate. We do not find it necessary to determine whether turning over an undivided interest in a stock of merchandise, which interest is estimated to be of a certain value, is equivalent in law and in fact to contributing merchandise of a certain cash value, for the reason that we are compelled to reverse this case, however that particular question may be.

It appears from the evidence in this case, that prior to the formation of this special partnership, a partnership in a similar business existed between appellee and C. L. De Mange, and that said former firm had become indebted to Wilson Brothers, and was unable to pay, and that to protect the firm,

appellee, shortly before the formation of the special partnership, purchased from said Wilson Brothers their said claim, paying therefor the sum of \$1,754.19, and took an assignment of said claim to himself, and it was credited to him on the books of the firm. This indebtedness of the old firm does not appear, so far as we can ascertain from the evidence, to have been settled or paid up at the time of the formation of the special partnership in question, but seems to have been paid to appellee during the continuance of the special firm in small payments made from time to time out of moneys received by the said firm in course of its business. It is contended by appellee that it is not shown that this money was paid to him out of the firm assets. *Non constat*, he says that De Mange did not obtain the money from some other source than out of the firm assets. But the source whence De Mange got money to pay other claims to appellee is shown, and no attempt is made to show the source of the payments made from time to time on this debt. We think the fair inference from the evidence as it is in this record, is that this claim against the old firm was held by appellee against the new firm, and paid by the new firm, and if this was so, then it operated as a practical withdrawal of capital by appellee to the amount of such claim.

The purpose of requiring a certificate of the amount of capital contributed by the special partner is to enable those who may deal with the firm to estimate the credit that may be prudently extended to it, and it is strictly just that they shall be able to make such estimate with the greatest possible accuracy.

It is clear that if the new firm in fact assumed to discharge and did discharge the old firm's debt to the special partner, his certificate of the amount of capital contributed to the new firm would be misleading and deceptive, as a means of estimating the credit that should be allowed to the new, and might well operate as a snare or trap to those who extend credit to it. The certificate would be substantially untrue, and in our opinion the special partner would become liable as a general partner.

We have been urged by counsel for appellants to enter a judgment in this court against appellee for the amount of their claim. We do not deem the case a proper one for the adoption of that course. The evidence on the point on which we reverse the case is not altogether clear, and we are of opinion that justice between the parties may be more certainly attained by remanding the case for another trial, when further evidence may be introduced, and the facts with reference to the source of the fund for payment of the Wilson claim to appellee be more clearly shown. The judgment will be reversed and the case remanded.

Reversed and remanded.

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44 149

JOHN S. COOK

v.

ISADORE F. W. GILLMORE ET AL.

Trusts—Compensation of Trustees—Failure to Provide for.

A trustee appointed under an order containing no provision for payment can not recover compensation for his services.

[Opinion filed October 23, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. LYNN HELM, for appellant.

Mr. C. S. MILLER, for appellees.

MORAN, J. Appellant filed his petition to have his accounts as trustee settled, and asking that he be relieved from the trust and a successor appointed, and that compensation be allowed to him for services rendered by him in and about the execution of the trust. It appears that by a contract

entered into between appellees and one Frederick Ayer, certain funds arising out of a sale of real estate, being in the shape of promissory notes received, and amounting in all to some \$31,000, were constituted trust funds for appellees, and Robert D. Wilson was appointed trustee of said funds. This agreement was confirmed and carried out by a proceeding in court relating to said real estate, and said Wilson was appointed trustee without any provision being made either in the agreement or order of court for his compensation.

On the death of said Robert D. Wilson, appellant was, at the request of all the appellees, appointed trustee and given custody of the trust fund, but the order appointing him contained no provision for compensation. He performed the duties of the trust, which required much personal attention and the expenditure of considerable time, and he now insists that he is entitled to be recompensed for the services by him rendered in the discharge of the duties of the trust. If the question could be regarded as an open one on the law, we should have little difficulty in concluding that appellant was entitled to compensation for time and attention rendered by him; but we understand it to be an established rule, that "the trustee shall have no allowance for his trouble and loss of time." This rule is laid down in all the elementary works on trusts and trustees, and is established by a consistent line of decisions of the courts of chancery in England. See Hill on Trustees, 889; Perry on Trustees, Sec. 904; 2 Lewin on Trusts, 627, and cases cited by those authors. The rule has been applied in all its strictness in this State, whenever the question has arisen. *Constant v. Matteson*, 22 Ill. 546; *Hough v. Henry*, 71 Ill. 72; *Higgins v. Rider*, 77 Ill. 360.

In the case last cited the Supreme Court said: "At the common law and in the absence of a contract, a trustee was entitled to no compensation for the management of the trust property. He was under no compulsion to accept the trust, and could, if he desired, impose any terms he chose as the conditions upon which he would accept; and the person proposing to create the trust had his option to comply or not as he chose. But having accepted without any agreement for

compensation, the trustee might charge for all reasonable and proper expenses incurred for caring for and preserving the trust property or fund. This being the law, and no contract having been made for compensation, by what rule or for what reason can it be claimed from the *cestui que trust*?"

Such being the rule recognized and established by our Supreme Court, we are not at liberty to depart from it and follow a different rule, no matter how well established by respectable courts in other jurisdictions.

None of the circumstances urged by counsel for appellant serve to distinguish this case, so far as regards this point, from the cases in which the doctrine has been applied in this State.

We regard the decree of the Circuit Court as in all respects correct, and the same will therefore be affirmed.

Decree affirmed.

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44	87

G. W. LEIHY

v.

F. A. BRIGGS.

Sales—Articles Intended for the Use of One of Several Partners—Purchase in Firm Name—Promise by One of Several Partners to Assume Firm Debt—Acceptance by Creditor of Offer—Evidence.

1. Articles intended for the use of one of several partners may be purchased in the firm's name, if so purchased with the consent of all the partners, and when such articles are purchased and are charged to the partnership account, the debt will not be changed from a joint debt of all the partners to a several debt of the one who used the chattels, by the refusal of the other partners to treat the debt as a firm debt.

2. If one of several partners promises a creditor of the firm of which he is a member to assume and pay his entire debt, and the creditor agrees to look to him alone, a substitution of debtor is affected and the other partner is released.

3. In an action to recover the price of a phaeton and other property sold to a certain firm, it being contended by the plaintiff that because they were

Leihy v. Briggs.

purchased for the defendant's wife, the price thereof could not become a firm debt, this court holds, that in view of the agreement entered into by the members thereof, to settle differences existing between them, that the other partner should assume all indebtedness of the partnership, and of the fact that he was accepted as debtor by the plaintiff, operated to release the defendant from all liability upon such claim.

[Opinion filed October 23, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs MONROE & McSHANE, for appellant.

The agreement on the part of Leihy to turn over the property to Acker, and Acker's agreement to pay the debts of the firm, including this, was certainly a good consideration moving from Leihy to Acker; and when Mr. Briggs, who was present, aiding in the consummation of that agreement, said to Mr. Leihy, "If you will do that, I will take Acker and release you," and Leihy accepted, that was a good and valid consideration for Briggs' agreement. When Leihy executed his part, his liability to Briggs either individually or as a member of the firm was ended. Mr. Leihy was never individually liable to Mr. Briggs. When his liability as a partner ceased his individual liability ceased. So there was no need of any special plea denying individual liability or setting up that the debt was due from Acker & Leihy.

Messrs. C. H. WILLETT and C. PORTER JOHNSON, for appellee.

The principle of law which we ask the court to modify is stated in the opinion in these words: "The rule is that if one partner promises the creditor to assume and pay the entire debt, and the creditor promises to look to him alone, a substitution of debtors is effected, and the other partner is released. This is founded on the doctrine that the sole liability of one of two debtors may, under many circumstances, be more beneficial and convenient than the joint liability of two, and therefore the change is founded upon a valuable consideration;

and whether it was actually a benefit in each particular case will not be looked into, but the agreement will be sustained. Bates on Part., Sec. 505."

The courts adopts this *dicta* of the text of Bates which comes from a misconception and misquotation of the opinion of Denman, C. J., in Thompson v. Percival, 5 Barn. & Adol. 925, A. D. 1834, where, on page 932, he says:

"It appears to us that the facts proved, raised a question for the jury, whether it was agreed between the plaintiffs and James, that the former should accept the latter as their sole debtor, and should take the bill of exchange accepted by him alone, by way of satisfaction for the debt due from both. If it was so agreed, we think that the agreement and receipt of the bill would be a good answer on the part of Charles Percival to this demand, by way of accord and satisfaction. It is not necessary to determine whether the assent of Charles to this agreement was necessary, in order to give it such an operation, because if it was, there is evidence of a delegation by Charles to James to make such an agreement, for James had the partnership effects left in his hands, and was to pay all the partnership debts.

"It can not be doubted but that, if a chattel of any kind had been, by the agreement of the plaintiff and both the defendants, given and accepted in satisfaction of the debt, it would have been a good discharge. It is not required that the chattel should be of equal value, for the party receiving it is always taken to be the best judge of that in matters of uncertain value. Andrew v. Bonghey (Dyer, 75 a). Nor can it be questioned but that the bill of exchange of third persons, given and accepted in satisfaction of the debt, would be a good discharge. But it is contended that the acceptance of a bill of exchange by one or two debtors can not be a good satisfaction, because the creditor gets nothing which he had not before. The written security, however, which was negotiable and transferable, is of itself something different from that which he had before; and many cases may be conceived in which the sole liability of one or two debtors may be more beneficial than the joint liability of two, either in

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respect to the solvency of the parties or the convenience of the remedy, as in cases of bankruptcy or survivorship, or in various other ways; and whether it was actually more beneficial in each particular case can not be made the subject of inquiry.

"The cases of *Lodge v. Dicus* (3 B. & A. 611), and *David v. Ellice* (3 B. & C. 611), are said to be against this view of the law. In the former, however, no new negotiable security was given, nor does the difference between the joint liability of two, and the separate liability of one, appear to have been brought under the consideration of the court."

In this case it was left for the jury to say whether an accepted bill of the continuing partner was not an accord and satisfaction of the firm's debt.

In *Lyth v. Ault*, 7 Ex. 669, Alderson, J., p. 674, sustains the opinion in these words: "It is demonstrable that the sole security of A may be a better thing than the joint security of A and B; for, by accepting the sole security of A instead of the joint security of both debtors, the creditor possesses a legal remedy against A during his lifetime, and against his assets after his death, and no security whatever against B. Now, as to the case where the security is joint. After the death of A there exists a legal liability of B, and no legal liability of A's assets; but an equitable remedy against the assets of A, subject to the necessity of making B a party to a suit in equity. Now, these two securities are different things, and therefore a bargain to take the one for the other is good. Cases may be suggested of A being rich and B poor, in which the advantage of taking A as the debtor in lieu of A and B is clear; or it may be that B is as rich as A, in which case the creditor may fairly consider that one debtor alone is preferable to both together. If, instead of B, the names of a hundred persons be substituted, these persons must all be made parties to a suit in equity. *Wilkinson v. Henderson*, 1 My. & K. 585; *Thorpe v. Jackson*, 2 Y. & C. 553, where Lord Eldon's opinion in *Ex parte Kendall* is quoted. Now, in a suit in equity where a hundred parties are in the suit, the

chances of its lasting many years and of its costing much are infinite."

In *Backus v. Forbes*, 20 N. Y. 204, head-note reads: "It was agreed between two partners and a creditor of the firm that it should be submitted to arbitrators to divide and appropriate the assets as they deemed fit for the payment of debts, and to determine which of the partners should pay the creditor, and the other should be discharged. Held, such submission constitutes a sufficient consideration, and that an award discharging one of the partners is a bar to an action against him."

The submission was in writing, signed by the partners and the creditor.

Comstock, J., on page 207, says: "It is quite true that the obligation of one of two joint debtors, substituted for that of both, affords no new security to the creditor."

In *Collyer v. Moulton*, 9 R. I. 90, quoting the *dicta* of *Thompson v. Percival*, *supra*, it is held the facts do not warrant it.

In *Walstrom v. Hopkins*, 103 Pa. St. 118, A. D. 1883, head-note reads: "A promise by the creditor of a firm to release a partner who has retired from the firm, that he would look to the continuing partner only for payment of his debt, unless founded on a legal consideration is *nudum pactum*, and can not be enforced."

The facts are on all fours with the case at bar; Gordon, J., said (page 120): "Were we to approve of the judgment of the court below, we must adopt the doctrine that a consideration purely moral in its character, an empty promise, without more, is sufficient to support a legal contract."

In *Lodge v. Dicus*, 3 Barn. & Ald. 611, A. D. 1820, head-note reads: "Upon the dissolution of a partnership, it was agreed between the partners that one of them should take upon himself to discharge a debt to A; A was informed of this, and expressly agreed to exonerate the other partner from all responsibility. Held, that these circumstances did not constitute any defense to the latter in an action by A against both partners."

In *David v. Ellice*, 7 Dow. & Ry. 690, head-note reads:

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“One of four partners having retired, the other three continued the business, assuming the funds, and charging themselves with partnership debts. A, a creditor of the old firm, was informed of this arrangement, and his account was, with his consent, transferred from the old firm to the new, with whom he continued to have dealings, drawing upon them and making them payments for about twelve months, when they failed, in his debt. Held, that the retired partner was still liable to A for the balance due to him by the old firm, though if A had drawn for that balance at any time during the solvency of the new firm, it would have been paid.”

In *Early v. Bart*, 68 Ia. 716, head-note reads: “The promise of one partner to pay a debt for which he is already bound is no consideration for an agreement to release the other partner.”

In *Clark v. Billings*, 59 Ind. 108, head-note reads: “In an action on a promissory note, executed by a partnership, an answer by one of the partners, that, with the consent of the plaintiff, he had retired from the partnership, and transferred his interest in the partnership goods to the remaining partner, who had assumed the debts of the partnership, is insufficient.”

In *Chase v. Vanghan*, 30 Me. 412, head-note reads: “A parol contract to discharge one of two joint debtors, if made without consideration, can not be enforced.” The promise was to take the continuing partner for a firm debt. *Thomas v. Shilliber*, 1 Ex. 124; *Georgia Co. v. Castleberry*, 43 Ga. 187; *Eagle Manf. Co. v. Jennings*, 29 Kan. 657.

MORAN, J. Appellee brought this action against appellant to recover for the price of a phaeton, single harness, robe and whip, sold and delivered.

Plaintiff's evidence, which consisted of depositions of witnesses, clearly showed that said articles were, on the order of Acker & Leihy, of which firm appellant was at that time a member, shipped from San Francisco, Cal., to appellant's wife at Eureka. The articles were ordered in the name of Acker & Leihy by appellant, with the knowledge of his partner

Acker, and were charged against the firm on the books of appellee. Appellee's counsel contends that because they were purchased for appellant's wife they could not properly be charged to the firm and that the price of them did not become a firm debt.

Articles intended for the use of one of the partners, may be purchased in the firm's name, if so purchased with the consent of all the partners, and when articles are so purchased on the partnership credit and charged to the partnership account, the debt will not be changed from a joint debt of all the partners to a several debt of the one who used the chattels, by the refusal of the other partners to treat the debt as a firm debt. Appellant swears that the articles in question were charged to him on the books of Acker & Leiby, and went with other accounts into the settlement between him and his partner.

The fact that the debt sued for was a firm and not an individual debt, would not avail appellant as a defense to this suit. But the contention is, that being a firm debt it was assumed with all other firm debts and agreed to be paid by his partner Acker, in a settlement of his partnership matters, and that in consideration of his making such settlement appellee agreed to take Acker for the indebtedness due to him from the firm, and to release appellant from liability for said indebtedness.

Appellant testified upon the trial that a difference arose between himself and his partner, and that appellee, to whom the firm was indebted in a large amount, came to Portland, Oregon, where the firm was doing business, and arranged a settlement between appellant and his said partner. That the settlement was that appellant should take some lots situated in Chicago and \$800 in money for his interest in the firm, and that Acker should assume and pay all the firm debts; that said settlement was negotiated by appellee, and in consideration of appellant's agreeing to such settlement, appellee agreed to take Acker for the whole firm indebtedness and release appellant. A schedule of the firm debts was made out showing those assumed by Acker, and among others on

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said list was the charge for the phaeton, harness and whip, for which recovery was now sought.

Appellant's account of the settlement and agreement is supported by the testimony of his son, and is practically without contradiction. We are, therefore, compelled to find that the agreement of Acker to pay the firm debts was made, and that the agreement of appellee to take Acker for the firm debts and release appellant in consideration that appellant would agree to the settlement, was also made. This agreement, in our opinion, constitutes a good defense to the action. The rule is, that if one partner promises the creditor to assume and pay the entire debt, and the creditor promises to look to him alone, a substitution of debtor is effected, and the other partner is released. "That is founded on the doctrine that the sole liability of one of two debtors may, under many circumstances, be more beneficial and convenient than the joint liability of two, and therefore the change is founded upon a valuable consideration; and whether it was actually a benefit in each particular case will not be looked into, but the agreement will be sustained." Bates on Partnership, Sec. 505.

"If one of the debtors agrees to surrender, and does surrender to the other his interest in the property and funds which they own together, an agreement of the creditor to discharge him and look to the other is well founded on that consideration. Backus v. Forbes, 20 N. Y. 204; see, on same point, Thompson v. Percival, 5 B. & Ad. 925; Lyth v. Ault, 7 Ex. 667; Collyer v. Moulton, 9 R. I. 90; Walstrom v. Hopkins, 103 Pa. St. 118.

The finding and judgment of the Superior Court must be reversed and the cause remanded for a new trial.

Reversed and remanded.

NEIL MCCOULL

v.

S. HERZBERG.

33	542
64	495
83	542
92	1621
83	542
107	1182
107	1182
83	542
115	1570

Landlord and Tenant—Sewer Gas—Recovery of Rent—Lease—Conditions—Fraudulent Representations.

1. A landlord does not insure that nothing exists touching the premises in question that will interfere with the health or comfort of his tenant nor is he bound to repair unless the lease so provides.

2. The law does not imply a contract on the part of a landlord that premises demised are tenantable or that they will continue to be so during the term.

3. An action at law to recover rent covenanted to be paid by lease under seal, can not be met by the defense that the lessee was induced to execute the lease by fraudulent representations as to the character or surroundings of the premises.

[Opinion filed October 23, 1889.]

IN ERROR to the Circuit Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Messrs. ABBOTT, OLIVER & SHOWALTER, for plaintiff in error.

If A, by deceitful representations as to the sanitary condition of a dwelling house, induces B to take a lease of the same, the latter, on discovering the real condition of the house, may elect either to repudiate the lease and vacate, or to retain his leasehold and use the premises for any purpose not inconsistent with the covenants or restrictions contained in the lease. In the former case all covenants become void; in the latter all covenants are of course binding. In either case B may have his action for the deceit. If he has repudiated the lease, the measure of damages may be nothing more than the expense of moving in and out; if he has elected to abide by the lease, the measure of damages may be nothing more than the difference in value between what the leasehold estate was actually

 McCoull v. Herzberg.

worth, and what it would have been worth had the false representation been true—in other words, the cost of such repairs as would make the house answer the representation. If, after discovering the falsity of the representation B continues to hold and occupy the premises, this is an election to abide by the lease, and B is, of course, held to all covenants made by him, including the covenant to pay rent. *Morey et al. v. Pierce*, 14 Ill. App. 91; *Arnold v. Clark*, 45 N. Y. (Superior Court) 253; *Drew v. Beal*, 62 Ill. 165; *Flynn v. Hatton*, 43 Howard's Pr. 333; *Walker v. Swayzee*, 3 Abbott's Pr. 136; *Sedgwick on Damages*, 7th Ed., Vol. 1, 606; Vol. 2, 557; *Benjamin on Sales*, 3d Am. Ed., 436, 437, 441.

If we are to assume such a state of facts as would have given Herzberg an action for deceit against McCoull, then, since Herzberg discovered the fraud in November, but continued thereafter to hold the premises and pay rent, it must be said that he elected to stand by the lease.

A landlord is under no implied obligation to repair; nor where premises are let for a particular purpose—where the use is restricted by covenants or conditions—is there any implied warranty by the landlord of fitness for such purpose. A tenant can not, therefore, relieve himself from his obligation to pay rent by vacating. 1 *Washburn on Real Property*, 5th Ed., 576; *Taylor's Landlord and Tenant*, 7th Ed., 330; *Foster v. Peyser*, 9 Cush. 243; *Hart v. Windsor*, 12 M. & W. 68; *Cleaves v. Willoughby*, 7 Hill, 83; *Wheeler v. Crawford*, 86 Penn. St. 327; *Purcel v. English*, 86 Ind. 34; *Cowen v. Sunderland*, 14 N. E. Reporter, 118.

Mr. C. C. STRAWN, for defendant in error.

A provision in a lease, that "the lessor shall not be liable for any repairs on the premises during the term, the buildings now being in perfect order," has reference only to the condition of the building as edifices in perfect repair, and not to the condition of the surroundings, or the purity of the air in the vicinity, either then or at any future time. *Wood's Landlord and Tenant*, p. 609, Sec. 378; *Foster v. Peyser*, 9 Cush. (Mass.), 242.

It is a general principle of law, well understood by the pro-

fession, that "any actual expulsion of the tenant, or intentional disturbance by the landlord, or by any other person acting by his authority, or by virtue of a legal right vested in them in any manner, which so seriously disturbs the tenant's possession as to compel an abandonment of the premises, by him, or which deprives him of their beneficial enjoyment, amounts to an eviction, and the rent is suspended from the time of such disturbance," and the question to be determined is, did the existence of this deleterious stench, the poisonous sewer gas in the house in question, as shown by the testimony in this case, amount to an eviction?

"If the landlord himself creates a nuisance upon, or in the vicinity of the premises, it amounts to an eviction, and this is so whether the nuisance arises from an act of omission or commission." Wood's Landlord and Tenant, page 803, note 1.

Where a landlord permitted the drains in his cellar adjoining the leased premises to get out of repair, so that the adjoining premises became untenable, it was held sufficient to constitute an eviction. *Alger v. Kennedy*, 49 Vt. 109; Wood's Landlord and Tenant, p. 803, note 1, and cases there cited. In *Cowie v. Goodwin*, 9 C. & P. 65, the tenant proved, in an action for use and occupation, that the wall of the privy gave way, and the filth from it flowed into the kitchens, so as to render them uninhabitable. Lord Denman said: "I shall ask the jury whether these premises were unfit for proper and comfortable occupation, and if the defendant had *bona fide* quitted the apartments as soon as he could procure others;" and the jury having answered both questions in the affirmative, the plaintiff was non-suited, and on motion for a new trial for misdirection the rule was refused. Wood's Landlord and Tenant, p. 804, in note 3, commencing on p. 803.

On p. 805 of Wood's Landlord and Tenant, it is said: "If the landlord lets only part of a building—as in the case at bar the first flat and basement—and permits the part retained by him to fall into such a state of disrepair as to render the part occupied by the tenant untenable, either by dilapidation or because the premises are thereby rendered unhealthy, as if he permits a drain to remain stopped up, so as

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to emit unwholesome gases or unpleasant stenches, this act of omission amounts to an eviction, and the tenant may give up possession."

The same author says, continuing on same page: "So, too, if the landlord fraudulently conceals the facts that a building is unfit for habitation because of a deleterious stench proceeding from an unknown cause, it has been held equivalent to an eviction." "But a distinction is made in this respect between the letting of a building that is unfit for occupation by reason of a cause affecting the health of the occupants, and one that merely produces annoyance and discomfort." Wood's Landlord and Tenant, p. 805.

GARNETT, J. McCoull leased certain premises to Herzberg for a dwelling, the term beginning September 10, 1885, and ending April 30, 1887. The tenant took possession the first day of the term, and occupied the premises until a few days after the 1st day of January, 1886. In November, 1885, an offensive smell was discovered in the house, which continued to appear at intervals, until Herzberg felt obliged to vacate the premises on that account, and he did remove therefrom in the following January. He paid the rent to January 1, 1886, but refused to pay any rent accruing thereafter.

The action below was for the installments of rent, falling due for January, February and March, 1886. The sole defense interposed was the offensive smell, which was alleged to have made it necessary for the defendant to leave the house. It is conceded that the smell came from the sewer in the demised premises. Neither artifice, contrivance nor fraudulent representation is charged against the plaintiff. He acted in entire good faith, having had the premises, including the sewer, thoroughly overhauled and repaired just before the letting to defendant, and had no reason to believe that any defect existed, which would interfere with the health or comfort of any occupant of the building. The landlord in such case is not an insurer, unless the lease by its terms makes him such. There is nothing in the lease to the defendant which affects the question here made. It is the settled doctrine

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that there is no implied contract on the part of the landlord that the demised premises are tenantable, or that they will continue so during the term. *Blake v. Ranous*, 25 Ill. App. 486. Nor is the landlord bound to repair unless he has expressly agreed to do so in the lease or contract of hiring. The defendant might have protected himself against the consequences now in sight, by agreement with the plaintiff, but the court can not make such an agreement for the parties.

The judgment is in conflict with the views here expressed, and for that reason is reversed and the cause remanded.

Reversed and remanded.

Upon Petition for Rehearing.

[Opinion filed March 24, 1890.]

GARNETT, J. The doctrine of this court is that an action at law to recover rent covenanted to be paid by lease under seal, can not be met by the defense that the lessee was induced to execute the lease by fraudulent representations as to the character or surroundings of the premises. They merely relate to the nature of the consideration which the lessee is to receive.

The question was decided in *Johnson v. Wilson*, opinion filed in this court, December 2, 1889, after mature consideration, and the rule was afterward affirmed in *Little v. Dyer*, at the same term. As the judgment in this case contravenes that rule, it must be reversed and the cause remanded.

Reversed and remanded.

JOHN O'BRIEN AND GEORGE GREEN

v.

HENRY H. GRAHAM ET AL.

Mechanic's Lien—Material Supplied—Sec. 31, Chap. 82, R. S.—Sub-Contractor—Architect's Certificate—Personal Decree—Notice.

O'Brien v. Graham.

1. Upon a bill filed by sub-contractors for a mechanic's lien, this court holds that the same was properly dismissed for the reason that the statutory notice was not served upon the owner of the building in question, within the time required by Sec. 31, Chap. 82, R. S.

2. No personal decree is authorized by the statute when there is a failure in the effort to establish a lien.

[Opinion filed October 23, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding.

Mr. LEVI SPRAGUE, for appellants.

Mr. T. H. HOOD, for appellees.

GARNETT, J. In 1886, one William Dunning agreed with Henry H. Graham to make certain alterations in a house or premises in Chicago, and afterward, about June 1, 1886, made a bargain with O'Brien and Green, appellants, for lumber to be used in the execution of the work. The lumber was to be delivered as required, during the months of June, July, August and September of that year, and paid for as any portion of it was delivered. In pursuance to the sub-contract, appellants made several deliveries of lumber prior to August 10, 1886. The material so delivered was all used in the work described, the total value thereof being \$268.80. By the agreement between Dunning and appellants they were to draw their pay on architect's certificates. To satisfy them for the \$268.80, Dunning procured a certificate for \$300 from the architect August 7th, and delivered it to them on August 10, 1886. At that time, Graham suspected the architect of too much partiality toward Dunning on account of accommodations in the way of loans of money which Dunning had made him. The result was that the architect was then discharged and Graham commenced to superintend the work himself, upon the agreement with Dunning that he should receive no more money unless it should be ascertained on completion of his contract that it had cost less than the original

contract price. Appellants thereupon became dissatisfied and refused to deliver any more lumber on the credit of Dunning. An agreement was then made between appellants and Graham, by which he was to pay them for all the lumber for the completion of the work. In pursuance of that agreement appellants delivered the lumber necessary to finish the alterations in the buildings, Graham paying them for all that was so delivered on his contract.

Appellants filed their bill for a mechanic's lien on the premises for the amount remaining unpaid to them on account of the lumber furnished before August 10, 1886. The Circuit Court found appellants not entitled to a lien and dismissed the bill. For all the goods delivered before August 10, 1886, appellants were sub-contractors. As such they could only perfect their lien by serving the statutory notice upon Graham within forty days after payment became due to them, as required by Sec. 31, Chap. 82, R. S.

In fact, the notice was not served until October 8, 1886, which was too late to preserve the lien. The question of personal liability of Graham by reason of his alleged promise to appellants to pay the amount of the certificate for \$300, is not of importance in this proceeding, as no personal decree is authorized by the statute when there is a failure in the effort to establish a lien. *Sprague v. Green*, 18 Ill. App. 476. The decree is affirmed.

Affirmed.

33 548
44 54
33 548
52 502

ALLEMANIA FIRE INSURANCE COMPANY

v.

WILLYS G. PECK ET AL.

Fire Insurance—Loss—Recovery upon Policy—Conditions—Failure to Bring Suit within Time Specified—Inducements to Adjustment—Special Findings—Evidence—Appeal.

1. On a second appeal, questions decided on the former appeal in the same case will not be reconsidered.

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2. If a part of the time allowed under the conditions of an insurance policy for the bringing of suit upon a loss, is consumed in negotiations touching a settlement, the time so occupied should be added to the period specified therein.

[[Opinion filed October 23, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. MYRON H. BEACH and W. P. THORNTON, for plaintiff in error.

Messrs. FLOWER, SMITH & MUSGRAVE, for defendants in error.

GARY, P. J. This case was before this court in 1886, and the facts, except upon the new question now presented, are reported in 20 Ill. App. 431. After the case returned to the Superior Court a new replication was filed to the second plea, alleging that the plaintiffs and the defendant were carrying on negotiations for the settlement and adjustment of the claim, and the defendant was holding out reasonable hopes for an adjustment, and thereby deterred the plaintiffs from commencing suit until the day it was commenced. And in answer to a special interrogatory, the jury have found that the company did hold out such reasonable hopes of an adjustment or compromise to the plaintiffs as to deter them from bringing this suit within the six months limited in the policy. The only question now open for discussion is whether the evidence supports the finding.

The doctrine is familiar that on a second appeal, questions decided on a former appeal in the same case, will not be reconsidered. *Smyth v. Neff*, 123 Ill. 310.

The negotiations relied upon were with the general agent of the company. They were had in personal interviews and by letters, the last letter from the agent, dated January 8, 1885, containing among other things, this:

"In regard to the Allemania, they claim that their policy was absolutely voided by reason of the violation of article 8 of section A. I have had several talks with the vice-president and the best terms that I can make will be to pay \$500 on the

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policy. I can not get them to admit of any liability, and they write me that they do not consider the company holden for anything. The case appears to me to be such a plain one that I would advise your acceptance of the offer. I want to get the case closed some time, and I know you do. Please advise me at your earliest convenience." There was time enough after that letter, which was the last step in the negotiations, no reply having been made to it, to have commenced the suit within the six months. No authority is cited as to what diligence, in order to avoid the bar, a policy holder of such a policy as this must exercise in bringing suit after negotiations are broken off. Considering that one month may not, in many cases, be unreasonably consumed in making the proofs of loss, and that the company has sixty days thereafter in which to pay, and that thereby the holder really has, under the terms of the policy, but about three months in which he may sue, the condition that he shall sue only within six months after the fire has occurred, is sufficiently stringent; and if during any part of that time the company deters him from suing he ought to have as much added to the original time.

It is not necessary to recite all that took place in the negotiations. They were all in the same spirit as the letter quoted, and it would have been quite inconsistent with that spirit for the holders of the policy to sue for a loss which the company was endeavoring to adjust and compromise, by paying a part, so long as from the conduct of the company there was reasonable ground to expect that the company would make terms that would be preferable to a suit. In the *Lebcher* case, 20 Ill. App. 450, the negotiations occupied less than three months, and the suit was not begun until more than eighteen months after the fire. In that case the limitation in the policy was one year. Upon the question here, that case has no bearing, as the suit was instituted on the forty-eighth day after the last letter. Whether the former decision of this court was correct can be made a question before the Supreme Court.

In that part of the case open to review here there is no error, and the judgment is affirmed.

Affirmed.

City of Chicago v. Chase.

CITY OF CHICAGO

v.

MARY A. CHASE.

Municipal Corporations—Negligence—Defective Sidewalk—Personal Injuries—Notice of Condition on Part of Authorities—Pleading—Evidence—Variance.

1. In an action against a municipality for the recovery of damages for injuries suffered through a defective sidewalk, this court holds that there was no material variance between the plaintiff's proof and the allegations set forth in her declaration, and declines to interfere with the verdict in her behalf.

2. Damages in the sum of \$2,000 for the breaking of a leg of a woman sixty-six years of age, held to be reasonable in the case presented.

[Opinion filed October 28, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

MESSRS. GEORGE F. SUGG, C. S. CAMERON and W. E. HUGHES, for appellant.

Mr. JOHN GIBBONS, for the appellee.

MORAN, J. Appellee recovered a judgment in this case against the city for the sum of \$2,000 for an injury received by her, by her foot being caught in a hole in the sidewalk, which caused her to fall over and break her leg. The evidence in the record clearly supports the verdict as to the fact of the injury. It is shown that appellee was walking along the sidewalk on the north side, east of Oakley street, in the night time. That snow covered the walk, and that a path was trodden wide enough for one person to walk on. That appellee in walking along said trodden path slipped, and stepped with one foot one side of said trodden path; that her foot went down through a hole in the sidewalk, which hole

was hidden from view by the snow which covered the walk. These facts were uncontradicted. The evidence tended to show that the sidewalk at the point where the accident occurred was old and out of repair, and for a period of from a month to half a year before the accident there were planks missing and holes and spaces in the sidewalk, caused by planks having been broken, and though there was some contrariety in the evidence on this point, we think the evidence abundantly supports the conclusion that the sidewalk was in a dangerous condition, and had been so long enough to charge the city with notice. As to the damages the injury was shown to be severe, and though not permanent, the foot was subject to pains, and gave more or less annoyance up to the time of the trial, and with a person of appellee's age (sixty-six years) will probably continue to be painful at times as long as she lives.

The verdict is large, no doubt, but we do not feel at liberty to reverse the case on that ground.

Counsel for the city urge quite strenuously that the case should be reversed, for the reason that there is a variance between the manner of the injury as proved and as described in the declaration.

The declaration, it is said, alleges that accumulations of ice and snow rendered the sidewalk uneven, ridgy and hubby, and that there was no proof of that allegation. The allegation is superfluous. It was not necessary to make any such allegation to support the cause of action, nor is the allegation essentially descriptive, or so connected with material averments that it can not be separated. The very ground of the action is the bad and unsafe condition of the sidewalk. The many faults in it as alleged are that planks were broken, warped, loose, uneven and removed. Proof was that appellee stepped into a hole in the sidewalk. It does not clearly appear what caused the particular hole into which she stepped, but it is not alleged specifically how it came; therefore, if the evidence would justify the finding that it was either from a plank being broken or warped, or loose, or removed, there would be no variance.

This differs from *City of Bloomington v. Goodrich*, 88 Ill.

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558, cited by counsel. There the sole allegation was that some of the planks were broken, so that large and deep holes were in the walk, and the proof showed that none of the planks were broken and that the only defect was that two planks were removed from the walk.

The declaration in the case at bar is not well drawn, is involved and prolix and therefore defective in form, and by no means a model of concise and definite pleading; but it is good in substance, and contains no faults that would authorize the arrest of the judgment, or the reversal of the case on error.

It is unnecessary for us to discuss in detail the errors alleged to have been made in giving and refusing instructions. It is sufficient to say that we have examined the instructions and considered the points of error alleged, and that we are of opinion that no error was committed in that regard. The judgment of the Superior Court will be affirmed.

Judgment affirmed.

HERBERT M. KINSLEY
v.
FRANCIS L. CHARNLEY.

38	558
44	315
38	553
72	534

Master and Servant—Architect—Exclusive Attention—Extra Compensation—Contract under Seal—Parol Contract—Guaranty.

1. A contract under seal can not be varied by parol.
2. For the payment of money, a contract to see it paid is, when another is to pay it, a guaranty.
3. Extra compensation can not be claimed for doing the work in question, not better than the contract calls for, but better than it otherwise would have been done.

[Opinion filed October 28, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. FRANK J. LOESCH and CHARLES A. ALLEN, for appellant.

Messrs. TENNEY, HAWLEY & COFFEEN, for appellee.

GARY, P. J. This was an action of assumpsit brought by the appellee against appellant, to recover for services alleged to have been performed as architect and superintendent of a certain building erected in the year 1885, by appellant, in the city of Chicago.

In November, 1884, appellant and appellee entered into a written contract, which was as follows:

"Whereas, Herbert M. Kinsley is about to erect a building on Adams street, in the city of Chicago, upon the following described lot, to wit: The east one-half of lot seven (7), block one hundred and twenty (120), School Section addition to Chicago, in the county of Cook and State of Illinois, to be used as a restaurant and generally in his business, and for the purpose of aiding in such work is desirous of securing the services of an architect.

"Now, therefore, it is understood and agreed by and between the said Herbert M. Kinsley and Francis L. Charnley, that the said Charnley shall make and draw the plans, specifications and drawings for the said building; the specifications to be such as can be used by the workmen erecting said building; the said Charnley is to superintend the building and see that the contractors for each and every portion therein shall complete their work in a workmanlike and satisfactory manner with due diligence; and he shall draft all contracts and specifications between the said Kinsley and said contractors, and shall see that the said building is fully completed in accordance with the plans, specifications and contracts so drawn, for all which service the said Charnley shall receive a compensation of three per cent. upon the amount of the cost of said building.

"Said Kinsley reserves the entire control of the contracts to be made, so far as the parties to the same shall be concerned and the amounts to be paid.

"And it is further agreed, in case the said Kinsley's lessor shall not secure to him the possession of the premises above described, on or before the 23d day of February, A. D. 1885, that then and in that event this contract shall cease, and the compensation to said Charnley for so much work as he then shall have done shall be the sum of \$500.

Kinsley v. Charnley.

"In witness whereof, the parties hereto have hereunto set their hands and seals this day of November, A. D. 1884.

"F. L. CHARNLEY, [SEAL.]

"H. M. KINSLEY. [SEAL.]"

The total cost of the building referred to in the above contract was \$146,571.04.

The controversy arises over the claim made by the appellee for an extra two per cent. upon the cost of the building, which claim, as he states in his testimony, stands upon the following circumstances:

"Q. State whether or not you made any other or additional contract or agreement with Mr. Kinsley than the one that has been introduced in evidence. When was it, and where was it?

"A. It was a verbal agreement. It was about the time or immediately after the roof was put on; I was going along Dearborn street; it was in July—soon after the middle of July; I think it was in 1885. I saw Mr. Kinsley across the street and he came over and said to me: 'Charnley, I don't believe we are ever going to get into that building in November, and I must open in November because then my harvest commences, and I wish to open under favorable circumstances.' He said: 'I don't believe they are going to get that done in November. The only way they will get it done will be for you to go there and give your whole time and attention to that building, because if you don't we will never get in there in that time, and if we don't get in there in November, we might just as well stop now.' I told him I could not very well do that because I would have practically to drop my other business; I told him I was doing some work for Chapin. Mr. Chapin was building his house at that time; he wanted me to give my attention to his building. Kinsley said he would see Mr. Chapin and that he was willing to pay me for it. He said: 'I must have that building done in November, and I want you to give your whole time to it.' 'Well,' I said, 'If you are willing to pay me for it, and Chapin is willing to relieve me of the personal superintendence of his building, I will do it.'

"I told him I never had any doubt but that the building would be completed according to the contract. I went there to the building. Kinsley got a boy to run errands for me and he got a desk there for me, and after we got the roof on I made my office practically in that building. After this conversation with Kinsley I was at the building all day, from the time we got the roof on until we got through; the building was ready to open the 15th of November."

The contract is under seal and therefore can not be varied by parol. *K. & S. W. R. R. v. Fitzgerald*, 17 Ill. App. 525, and *I. C. R. R. v. B. & O. R. R.*, 23 Ill. App. 531, and many cases cited in those.

The contract provides that the appellee shall "superintend the building and see that the contractors for each and every portion therein shall complete their work in a workmanlike and satisfactory manner, with due diligence." It bound the appellee to do whatever was in his power to make the contractors do their work as well and as quickly as their contracts required. Literally read it made him a guarantor that they would do so.

For the payment of money, a contract to see it paid is, when another is to pay it, a guaranty. But it is not necessary to so construe this contract.

The claim of the appellee is, in effect, that he took more pains to perform the contract he had made, than he would have done if the appellant had not urged him to do it. There is nothing in the case indicating that the work was done better or quicker than the contractors had engaged to do it.

That a contract, whether sealed or not, does not preclude compensation for extra work, is admitted; but that extra compensation can be claimed for doing, not better work than the contract calls for, but better than otherwise would have been done, is not the law.

All the evidence of custom of architects, for the purpose of construing the words of the written contract, was incompetent. *Sigsworth v. McIntyre*, 18 Ill. 126.

The judgment must be reversed and the case remanded.

Reversed and remanded.

CITY OF CHICAGO

v.

FRANCIS COLMAN.

Municipal Corporations—Negligence—Defective Sidewalk—Personal Injuries—Damages—Excessive Verdict—Evidence—Burden of Proof—Instructions—New Trial.

38 557
61 390

1. An instruction in the absence of evidence upon which it can be based should not be given.

2. In an action brought for the recovery of damages from a municipality, for injuries suffered through a defective sidewalk, this court holds that in view of the evidence the verdict for the plaintiff in the sum of \$4,000 was excessive, and that the trial court erred in refusing to grant the defendant's motion for a new trial for that reason.

3. In actions of this character the burden of proof is upon the plaintiff, to show not only such circumstances as make the municipality answerable for the injury sustained, but also the character and extent thereof.

[Opinion filed October 28, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Mr. GEORGE F. SUGG, C. S. CAMERON and W. E. HUGHES, for appellant.

Messrs. CASE, JUDSON & HOGAN, for appellee.

Our Supreme Court has held in *Christian v. Irwin*, 125 Ill. 619, that "the amount of damages a party may have sustained from a personal injury is a question of fact."

This court has wisely said in *Anglo-American P. & P. Co. v. Bair* (not yet reported): "In truth, money is no equivalent for such injuries, but it is the only reparation the law can give, and the amount must be left to a jury to fix, subject to correction in case of abuse." And again in *Wilcox v. Railway Co.* (not yet reported), this court said: "The damages awarded are large, that is, a large sum of money—\$15,000. Are they more than compensation? If the appellee is entitled to anything he is entitled to full compensation. Is that limited to making good the probable pecuniary loss to him,

for, having lost one leg to go upon, either natural or artificial, or shall other deprivations which can not be recited without the use of language which excludes arithmetic, be taken into account? His life is wrecked, whether for business or pleasure. Hope is denied him. By the various tables of mortality at the time of the trial his expectation of life ranged from forty to fifty years. Where 'suffering in body and mind is the result of injuries caused by negligence, it is proper to take them into consideration in estimating the amount of damages.' Of the amount, under the facts, the jury were the sole judges, and where no other evidence of prejudice or passion appears in the finding, courts seldom set aside a verdict for excessive damages in an action like this. The court will not take the responsibility of determining that the damages are exorbitant." Citing *Railroad Co. v. Simmons*, 38 Ill. 242; *Railroad Co. v. Stables*, 62 Ill. 320; *Railroad Co. v. Martin*, 111 Ill. 219; *Railroad Co. v. Holland*, 18 Ill. App. 418.

In *Railway Co. v. Barrett*, 16 Ill. App. 30, the Appellate Court of the Second District lays down the rule, that "where pain and suffering are recognized elements in assessing damages for personal injuries, there can be no certain rules for their admeasurement, and consequently the law has let the assessment to the sound judgment of the jury, guided by proper instructions from the court, and before a court should interfere with the findings, by putting itself in the place of the tribunal, primarily established by the law to determine this question, it ought to be well advised that such verdict is not the result of the calm, dispassionate judgment of the jury, but results from some improper motives or influences, and that injustice would be done if the verdict should be allowed to stand."

This rule was approved by the Appellate Court of the Fourth District in *Railway Co. v. Frazier*, 26 Ill. App. 440.

In *Whitcowsky v. Weir*, 32 Fed. Rep. 307, \$4,000 was held not excessive damages for the loss of a hand.

In *Reed v. Railway Co. (Iowa)*, 37 N. W. Rep. 149, a verdict for \$8,250 was not disturbed where it was shown upon the trial that the plaintiff, a man of sixty-five years, was struck by a train, thrown from his wagon and that several of his ribs

were broken, that his lung was punctured, which caused great suffering and confined him indoors for several weeks, and that the injuries were apparently permanent.

A verdict for \$6,933 awarded to a woman for personal injuries who had been in good health, where the evidence as to the nature and extent of the injury was conflicting, but tended to show that she had received internal injuries resulting in uterine troubles, from which she was suffering at the time of the trial, was held not excessive. *Railway Co. v. Lee* (Texas), 7 S. W. Rep. 324. \$5,000 for the loss of one eye not excessive: *Johnson v. Railway Co.*, 9 S. W. Rep. 790; \$6,500 for loss of eye, not excessive: *Railway Co. v. Able*, 9 S. W. Rep. 871; \$8,000 not excessive for injury causing permanent stiffness of ankle joint: *Henry v. Railway Co.* (Iowa), 39 N. W. Rep. 193; \$5,500 not excessive for temporary injury; no loss of limb: *Karasich v. Hasbrouck et al.*, 28 Wis. 569; for the loss of hand and other injuries \$4,700 was deemed not only not excessive but as quite moderate: *Railroad Co. v. DeBray*, 71 Ga. 406.

And so we could go on almost indefinitely, citing case after case where verdicts ranging in amounts from \$5,000 to \$50,000 have been held to be not excessive. *Railroad Co. v. Alberti*, 43 Hun, 421; *Railroad Co. v. Thompson*, 64 Miss. 584; *Railroad Co. v. Ketcham*, 33 La. Ann. 777; *Groves v. Rochester*, 39 Hun, 5; *Railroad Co. v. Moore*, 34 Kan. 197; *Funston v. Railroad Co.*, 61 Iowa, 452; *Railroad Co. v. Robinson*, 48 Cal. 409; *Railroad Co. v. Young*, 19 Kan. 438; *Railway Co. v. Porfert*, 10 S. W. Rep. 207; *Railway Co. v. Rosenweig*, 4 Cent. Rep. 712.

GARY, P. J. This is an action to recover damages for personal injury from the breaking of a plank in a sidewalk, resulting in the leg of the appellee going through the hole, and the knee-cap striking the edge of the plank in front. The leg was bruised, the appellee lost three or four weeks' time, has suffered a good deal of pain, and was not cured at the time of the trial.

The only evidence as to the probable future condition of the appellee was from the physician, who said that the pres-

ent swelling was the result of inflammation, and that he thought that the appellee could be cured, but how and in what time is somewhat vaguely stated in his testimony.

The court instructed the jury that if they found from the evidence that the injury was permanent and incurable, they should take that into consideration in assessing the damages. The jury found for the appellee, \$4,000.

In looking at all the evidence it is clear that, as compensation for past expense, loss of time and suffering, the verdict is excessive. It could only be justified as a compensation for future disability to some considerable extent. "There is no doubt that bodily pain and suffering is a proper item of damages in such cases. Nor is the evidence necessarily limited to suffering which is past, where the proof renders it reasonably certain that future pain and suffering is inevitable. Damages are to be proved, and none can be allowed except such as are shown by the proof to be, at least to a reasonable degree, certain." *Curtis v. R. & S. R. R.*, 18 N. Y. 535. The instruction was excepted to, and one ground of the motion for a new trial was the excessiveness of the verdict, the denial of which motion was also excepted to.

The burden was upon the appellee to show not only such circumstances as made the city answerable for the injury he had sustained, but also the character and extent of the injury, so that the jury should have other grounds for such a verdict than that the plaintiff was an individual to whom the sum would be very convenient, and the defendant a large city to whose gross outlay it would be an almost inappreciable addition; and that it might be conjectured, though not proved, that his injury was serious and permanent.

The views above expressed render it needless to examine questions of variance and criticism upon instructions, the grounds for which can be removed or avoided upon another trial.

For the error in giving an instruction without evidence to base it upon, and for that of not granting a new trial on account of the excessive damages, the judgment is reversed and the cause remanded.

Reversed and remanded.

GEORGE B. WALKER

v.

JAMES F. COOK.

Witnesses—Fees—Experts—Fees in Excess of Legal Amount—Recovery of—Promise to Pay—Obligation to Testify—Subpœna.

1. The usual or reasonable value of professional services is a question of fact, and not of science, calling for a professional opinion.

2. Where a duty is imposed by law and the compensation for its performance fixed by law, no greater compensation can be exacted or enforced.

3. A witness having attended court in obedience to a subpœna, is not entitled to recover upon an agreement for compensation for such attendance, exceeding in amount the legal fees.

[Opinion filed October 28, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. JOSEPH W. CALLAHAN, for appellant.

Every court having power to definitely hear and determine any suit, has, by the common law, inherent power to call for all adequate proofs of the facts in controversy, and to that end, to summon and compel the attendance of witnesses before it. 1 Greenleaf on Evidence, Sec. 309.

An undertaking to do that which one is under legal obligation to do will not furnish a consideration to support a promise. *Ayres v. Chicago, etc., Railroad*, 52 Iowa, 477; *Tilden v. New York*, 56 Barb. 340; *Elbin v. Miller*, 78 Ky. 371; *Morricks v. Giddings*, 1 Mackey, 394; *Keffer v. Grayson*, 76 Virginia, 517; *Sherwin v. Bingham*, 39 Ohio State, 137.

Fees or costs can not be allowed or recovered unless they are fixed and given by statute. *Smith v. McLaughlin et al.*, 77 Ill. 596; see 1 Greenleaf on Evidence, Sec. 310; *Starr & C. Ill. Stat.*, Chap. 53, Sec. 47; *Chase v. De Wolf*, 69 Ill. 48; *Camp v. Morgan*, 21 Ill. 255.

If the statute has fixed the fees to be charged for a particular service, the party rendering the services will be confined to the statutory fee, and can not recover on a *quantum meruit*. *Smith v. McLaughlin*, 77 Ill. 596.

A physician, like any other person, may be called to testify as an expert in a judicial investigation, whether it be of a civil or criminal nature, without being paid for his testimony as for a professional opinion. *Ex parte Dement*, 53 Ala. 389; *Summers v. The State*, 5 Texas Ct. of App. 365; See *Wright v. The People*, 112 Ill. 540.

What ordinary professional services are reasonably worth is a question of fact. *Pfeil v. Kenner*, 3 Wisconsin, 315; *Stanton et al. v. Embrey, Adm'r*, 93 U. S. 548; *Rosenthal v. Boas*, 27 Ill. App. 430; *Linn v. Sigsbee*, 67 Ill. 75; *City of Chicago v. McGiven*, 78 Ill. 347; *Pennsylvania Co. v. Congdon*, 101 Ill. 93.

A witness is bound, as a matter of public duty, to testify as to facts within his knowledge. *Webb v. Page*, 1 Car. & Kir. 23.

That compensation of witnesses for loss of time is not allowed, see 1 Greenleaf on Evidence, Sec. 310, n. 2, and authorities there cited.

Messrs. E. J. HILL & SON, for appellee.

MORAN, J. Appellee brought this action in a justice court to recover compensation for attendance as a witness in a suit in which appellant was the plaintiff.

There was judgment against appellant in the justice court, and he appealed the case to the Circuit Court, where it was submitted to the court for trial without a jury, and a final judgment rendered against appellant for \$50 and costs.

Appellee's evidence showed that he was subpoenaed as a witness and attended court for eleven days, while the case was on call, reporting to appellant's attorney and remaining each day till the notice, "No further call," was posted. That before the subpoena was served appellant told him that he wanted him as a witness, and appellee said he had other busi-

ness to attend to, whereupon appellant told him he would pay him just as well as if he was to attend to his patients.

The question raised is not whether an expert can recover *extra* compensation, when it is promised to him for attending and testifying to some matter pertaining to his particular branch of science. The question on which appellee was to testify, was as to the reasonable value of professional services rendered.

The usual or reasonable value of professional services is a question of fact, and not a question of science, calling for a professional opinion.

True, physicians may be better acquainted than others with the customary or usual charges made by the profession, but so dry goods merchants will know best as to the value of cotton cloth. Neither the value of the services nor the value of the cloth can be proved by what is known as expert testimony. *Linn v. Sigsbee*, 67 Ill. 75.

The question is, whether a witness who attends upon a subpoena to testify to a fact or facts within his knowledge, can recover from the person in whose behalf he is subpoenaed, on a promise to pay him more than the regular fee allowed by statute for attendance as a witness.

Every person is under a legal obligation to attend in obedience to a subpoena and testify to such facts material to the case in hand as may be within his knowledge. The statute has fixed the compensation for such attendance, and it is a rule general in its application, that where a duty is imposed by law, and the compensation for its performance fixed by law, that no greater compensation can be exacted or enforced. *Bishop on Contracts*, Sec. 47; *Joliet v. Twohey*, 1 Ill. App. 483; *Decatur v. Vermillion*, 77 Ill. 315.

This rule was applied to the claim of a witness at an early day in England in the case of *Collins v. Godefroy*, 1 B. & Ad. 950, where it was said: "If it be a duty imposed by law upon a party regularly subpoenaed to attend from time to time to give his evidence, then a promise to give any remuneration for lost time incurred in such attendance is a promise without consideration." In *Smith v. McLaughlin*, 77 Ill. 596,

certain physicians who had been subpoenaed by the coroner to make a post mortem examination, presented a claim for their services against the estate of the deceased. The court in the opinion, after stating that the statute made no provision for the payment of witnesses who are summoned to attend a coroner's inquest, says that if fees had been fixed for them, the sum thus fixed would have to control. "A witness or officer of the law," said the court, "has no legal right to recover on a *quantum meruit* for services rendered under the requirements of the law. For such services he is limited to the fee or compensation fixed by statute."

There was in that case no promise by any person to pay the witnesses for attendance, so the exact question presented by this record was not before the court.

We are not, however, without respectable authority directly in point. In *Dodge v. Stiles*, 26 Conn. 463, the plaintiff was subpoenaed as a witness for the defendant and received his legal fees. Before he was summoned defendant agreed with him to pay him as much per day for attending court as he could earn at his trade in addition to his legal fees. Suit was brought to recover upon said agreement, but the court held that to enforce the contract would be against the policy of the law. In the opinion it is said: "Were it otherwise, and witnesses might be allowed to make terms for testifying, there would, be room for oppressive conduct, and for corruption. Witnesses knowing that their testimony was indispensable would, under one pretense or another, make terms for their testimony, and such as might be induced to represent their testimony as important would be tempted to barter their oaths at the expense of truth and justice. Now, a promise to pay more than the statute fees for just this stated service, without further service or loss by the witness, may be said to be without consideration. It can not be important, in our view, whether the promise be made after the service of subpoena, contemporaneously with it, or before, provided the promise refers to this duty, and is founded on no other consideration."

Appellee having been subpoenaed and having attended court in obedience to said subpoena, is not entitled to recover

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on the agreement he sets up. If no subpoena had been served upon him, and he had attended as a witness under an agreement for compensation made with appellant and not in pursuance of the process of the court, a different question would be presented.

The judgment of the Circuit Court must be reversed and the case remanded.

Reversed and remanded.

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FOREST GLEN BRICK & TILE COMPANY

v.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

Railroads—Fires—Sparks—Latest and Most Approved Appliances—Use of Locomotive Stacks—Evidence—Instructions.

1. A railroad company may not, because of the exigencies of its business, inflict avoidable loss upon the owners of adjacent property. Such company must use every possible precaution by adopting all the best and most approved mechanical inventions, to prevent loss by fire along the line of its road.

2. An instruction which leaves it to the jury to find that a railroad company performed its duty by using means to prevent the escape of sparks not so good as the best and most approved, is erroneous.

[Opinion filed October 28, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Mr. ADELBERT HAMILTON, for appellant.

1. All the evidence in this case tends to show that this engine, 554, set this fire; the wind, the weather, the proximity of engine and yard, the close, circumstantial connection in point of time between the engine going by and the starting of the fire—all these facts make it an irresistible conclusion that engine 554 destroyed the property of this plaintiff.

2. Was it an unexcused act of negligence? Under the statute of Illinois relating to railway fires, the fact that the fire was communicated by the engine "shall be taken as full *prima facie* evidence, to charge with negligence the corporation * * * in the use and occupation of such railroad." 2 Starr & C. Ill. Stats. 1949, p. 104.

There was an improved spark arrester, known by the company. If it had been put on engine 554—the engine that was a "spark thrower," a "bad engine"—it would not have thrown sparks and set our property on fire.

What now was the diligence of the company defendant in adopting this appliance for fire prevention? This is an important question, because Judge Conger, one of the Justices of the Appellate Court in the Third District, speaking for that court in regard to the duty of railway companies to provide adequate spark arresters, said: "We think the true rule is that it is the duty of railroads to use every possible precaution to prevent loss to others by escape of fire from their engines, by the highest degree of diligence in ascertaining and adopting the best or the most approved mechanical inventions and appliances to prevent the escape of fire." C. & A. R. R. v. Hunt, 24 Ill. App. 644, 647.

For more than two years, until, in fact, August, 1886, the company never moved toward adopting this improvement on their freight engines. It was absolutely inactive; and when, in August, 1886, the order did come to put the extension arch upon freight engines, it was to be done only when the engines came in for "general repairs," that is, when they were worn out or wrecked.

The court erred in giving to the jury defendant's instructions 2 and 3, wherein the criterion of reasonable care is made the use by defendant of a spark arrester, generally used and adopted.

In one railway fire case the court says: "The sole question is, whether defendants did their duty, by using known agencies in general use, in order to prevent such accidents. It is undoubtedly their duty to use great care, and to adopt the best precautions which are in general use, to avoid such

danger. If defendants used ordinary care and skill in procuring such spark arresters as are generally in use in the country, and are approved by experienced railroad operators, and were not guilty of any negligence in that respect, then they are not liable for the plaintiff's loss, if they caused it. If, on the contrary the accident was due to their negligence in not providing their engines with those means in common use, then they are responsible if the accident was the result of that." *Gowen v. Glaser*, 10 Att. (Pa.) 417.

In another case the following instruction was given and approved: "It is negligence to use cars dangerous in their construction, when there are others to be secured which are not dangerous; and railroad companies are bound to procure the best, otherwise they must be held responsible."

"We can not hold this instruction as incorrect," said the court. *St. L. & S. E. Ry. Co. v. Valerius*, 56 Ind. 519.

It is a question for the jury to decide, says the New York court, whether, upon the evidence, a railroad company is guilty of negligence in not ascertaining the utility of, and adopting, an improvement to protect passengers from injuries by accidents to which the cars are liable. *Hegeman v. The Western R. R.*, 13 N. Y. 9.

In another New York case the railway company had tested and partially adopted a new form of switch, but neglected to adopt it at a point where it might have prevented an accident, had it been used.

"It has been held," said the court, "that railroad companies are bound to avail themselves of all new inventions and improvements known to them, which will contribute materially to the safety of their passengers, whenever the utility of such improvement has been thoroughly tested and demonstrated. Undoubtedly this rule is to be applied with a reasonable regard to the ability of the company and the nature and cost of such improvement; but within its appropriate limits it is a rule of great importance, and one which should be strictly enforced. A stronger case for the application of the rule than is here presented could scarcely arise. The improvement related to a part of the apparatus of the road,

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which is the source of numerous accidents. Its utility was undoubted and the expense trifling. The defendants had themselves recognized its value. If the principle should ever be applied, therefore, it should be applied here. The defendants were clearly in default in permitting the short switch to remain in use upon the road, especially at a place where there was a somewhat unusual complication of switches. The judge was fully warranted, therefore, in submitting this question of negligence to the jury, even if he would not have been authorized to assume, as matter of law, that the company had neglected their duty in this respect." *Smith v. N. Y. & H. R. R. Co.*, 19 N. Y. 133.

Similarly, the question of negligence by defendant in the case at bar, in not having put the extension arch and straight stack upon its freight engines, and particularly upon No. 554, should have been brought squarely before the jury. As a matter of fact defendant's instructions ignored it wholly.

"It is incumbent, therefore, on the companies, to use the greatest precaution, so as to secure the engines against emitting sparks." *Bass v. C., B. & Q. R. R. Co.*, 28 Ill. 18. (1862.)

"As this court has already had occasion to remark, it is not requiring too much of railway companies, which are sending over the country so dangerous an element as fire, that they should use all the appliances of science, and the highest degree of diligence to prevent the destruction of the immense amount of property contiguous to their lines." *St. Louis, etc., R. Co. v. Gilham*, 39 Ill. 457. (1866.)

Per Mr. Justice Breese: "Nor can I think the care and diligence a prudent man would use about his own property is of the same grade as that required of railroad companies. For the safety of the people and their property a degree much higher ought to be required. The care and diligence required in every case should have some relation or affinity to the nature of the business and of the instrumentalities by which it is conducted. The opinion of the majority of the court shows this." *Ill. Cent. R. R. Co. v. Mills*, 42 Ill. 412. (1866.)

But see *O. & M. R. R. Co. v. Shanefelt*, 47 Ill. 500, where the degree of diligence required of a corporation and individual

are declared to be equal as to clearing combustibles from right of way and from adjacent property.

"These bodies (railway corporations) should be held to the exercise of due diligence in operating their machinery. They should be required to provide and keep constantly in use and in proper repair the most approved machinery to prevent fire from spreading from their engines," etc. T. P. & W. R. Co. v. Pindar, 53 Ill. 450. (1870.)

At this date the court indicate that it is the duty of a railway company to "use all proper and reasonable precaution to prevent the escape of fire from their engines, by the application of the best and most approved mechanical appliances for that purpose." They say, moreover, that in order to meet a *prima facie* case of negligence the defendant company must "show by affirmative evidence that the engine at the time was equipped with the necessary and most effective appliances to prevent the escape of fire." C. & A. R. R. Co. v. Quaintance, 58 Ill. 392, 393. (1871.)

This year the court say: "The law holds them (railway companies) to the exercise of a very high degree of care and skill in the use of the most effective appliances to prevent the emission of fire sparks from their engines," and "when they have exercised the highest degree of care and skill in this regard, if loss occurs it must fall on the owner." T. W. & W. R. Co. v. Larmon, 67 Ill. 71. (1873.)

"The law doubtless required defendant to use every possible precaution, by the use of all the best and most approved mechanical inventions, to prevent the loss by fire along its road." C. & A. R. R. Co. v. Pennell, 94 Ill. 488. (1880.)

"We think the true rule is that it is the duty of railroads to use every possible precaution to prevent loss to others by escape of fire or sparks of fire from their engines by the highest degree of diligence in ascertaining and adopting the best or the most approved inventions and appliances to prevent the escape of fire." Appellate Court in Hunt v. R. R. Co., 24 Ill. App. 647. (1886.)

Messrs. WALKER & EDDY, for appellee.

Instructions 2 and 3 given on behalf of the defendant in the

court below, complained of in appellant's brief, it is submitted, contain a fair and correct statement of the law applicable to the case. They should be read in connection with the instruction given on behalf of the plaintiff, in which the jury are instructed that in order to rebut the *prima facie* case of negligence established by the defendant, the defendant must show that it, the defendant, "up to and at the time of said fire had used a reasonable degree of diligence in ascertaining and adopting the best and most approved mechanical inventions and appliances upon its said locomotives for preventing the escape of said sparks, cinders or fire, and if the jury believe from the evidence that the defendant has not used due diligence in this respect, and that by reason of its failure so to do," etc., verdict must be for the plaintiff.

The words complained of in the second instruction, that the defendant in the construction of its engines "must use good and sufficient netting or spark arresters, such as are most in use or such as have been approved by experienced railroad operators and mechanics, at or before the time of its fire," etc., are strictly in accordance with the law as laid down in *C. & A. R. R. v. Hunt*, 24 Ill. App. 644; *T., W. & W. R. R. Co. v. Corn et al.*, 71 Ill. 493.

Certainly no higher degree of diligence could be required of a railroad company than that stated in the third instruction given on behalf of the defendant company in the court below, and which is also complained of by appellant, wherein the jury is instructed that in order to relieve the defendant they must find that the defendant's engines "were equipped with proper appliances to prevent the escape of fire, such as suitable and proper netting, combs, ash-pans and dampers, and that in the construction of the smoke-stacks of the defendant's locomotives the netting or spark arresters and other appliances to prevent the escape of fire were of the kind and character that had been generally used upon railroads upon coal-burning engines, and were extensively used at the time of the burning, and that in the construction, use and operation of its locomotives the defendant had exercised *reasonable and proper care and diligence*" (exactly the language approved

by the court in *O. & A. R. R. Co. v. Quintance*, 58 Ill. 392), then the court," etc. The opinion of the Appellate Court above cited, distinctly says that a railroad is relieved by adopting the best or most approved mechanical invention and appliance to prevent the escape of fire. That is to say, it might adopt the newest and latest invention, though in doing so the burden of proof would be thrown upon it to show not only that it was the latest and newest invention for preventing the escape of fire, but also that it was better than the appliances most generally in use, or the company may use the most approved appliances, *i. e.*, those appliances most generally in use on railroads, and be relieved from all liability. It is not contended in this case that the defendant was at all negligent in discovering the merits of the straight stack, but it is contended that defendant did not use due diligence in making the change. But that contention is mere argument on the part of the appellant, as there is not a scintilla of evidence in the record to show that the defendant could have changed its 795 engines in less time than it did make the change; on the contrary, the record on this point shows that the change was made as rapidly as it could be made consistent with defendant's duties as a public carrier.

There is nothing, either in the direct testimony or in the cross-examination of defendant's witnesses, to show that under any circumstances the change could have been more quickly made. Of what effect, therefore, would it have been to have made the instructions stronger as to the diligence required in making the change?

GARY, P. J. Very soon after midnight on the morning of April 23, 1887, a house, barns, sheds, etc., of the appellants, situated upon their premises adjoining the railroad of the appellees, were burned, and appellants allege, by fire kindled by the sparks thrown from a locomotive of appellees.

Many trains of the appellees passed the premises of the appellants during the night, but the appellants fix upon locomotive No. 554, passing their premises at 12:02, going north, as the mischief maker. Whether they are right in that position

is a question for a jury. On coal-burning locomotives the case shows there are two kinds of stacks in use. The earlier kind is known by the name of diamond stack. The later, and as it is claimed by appellants, the safer kind for adjacent property, is the straight stack with front extension.

There was evidence in the case from which the appellants were warranted in insisting that No. 554, which carried the diamond stack, threw sparks that caused the fire, and that from such stacks more sparks were thrown than from straight stacks. The size of the sparks that may be thrown by either depends upon the size of the mesh of the netting used, but the straight stacks deposit much of the sparks that would escape from the diamond, in a pocket under the stack, from which they are removed when a large quantity has accumulated.

The appellees began in 1884 to change the stacks on their locomotives from diamond to straight, and from the evidence the appellants were warranted in insisting that one of the reasons on the part of appellees for such change was the greater safety of the straight as to throwing sparks. But in 1884 the appellees had more than 500 locomotives; to change the stacks of all was a work of great labor, requiring a good deal of time; and they had an immense traffic, needing the services of the locomotives, which, without the constant use of nearly all of them, would be seriously interrupted, to the great inconvenience of the public, as well as the appellants. The real question in the case is, whose is the risk as to the difference in the degree of danger between the diamond and the straight, when one of the former class, in good order and properly managed, is used? Is it run at the risk of the company, or of the adjacent property owner?

At the instance of the appellees the court gave, among others, the following instructions:

"First. The court instructs the jury that the plaintiff charges in its declaration in this action, that the defendant was operating and using a certain railroad, extending along and adjacent to the property of the plaintiff, and that while a certain locomotive engine of the defendant, and under its control,

was passing said property of the plaintiff, divers sparks and brands of fire then and there escaped, and were thrown, by and through the carelessness and negligence of the defendant, upon the property of the plaintiff, and that by reason thereof said property was wholly burned and destroyed. The defendant for answer to said declaration denies that it was guilty of carelessness or negligence, and denies that said property was burned or lost to the plaintiff through the negligence or carelessness of the defendant.

And the court instructs the jury, that under the issues in this case the plaintiff must sustain its claim that the fire in question was communicated by an engine of defendant, by a preponderance of the evidence. And you must also, under the evidence and instructions of the court, find that the defendant was guilty of carelessness or negligence in the construction or management of said engine, as defined in their instructions, or else you should find the defendant not guilty.

Second. The court further instructs the jury that the law requires of the defendant in the construction of its engines to exercise reasonable care to prevent the escape of sparks and fire, both from the smoke stack and ash pan of the engine, and for that purpose to use good and safe netting or spark arresters, such as are either most in use, or such as have been approved by experienced railroad operators and mechanics, at and before the time of said fire, and also that such spark arresters must be good and safe, and such as are approved by experience. And if the jury believe from the evidence that at the time of the alleged fire the defendant was using upon its road, passing near the plaintiff's property, engines equipped with spark arresters that had been adopted and generally used by railroad companies, and such as have been shown by experience to be reasonably safe, for the purpose of preventing injuries by fire to the plaintiff's property, and at the same time of such burning, or immediately preceding the same, all the engines of the defendant, charged with emitting fire, were properly equipped with proper spark arresters, and in good order, and were handled and operated in a prudent manner, so far as the same could be handled, for the prevention of

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the escape of fire, then the court charges the jury that the defendant has discharged its duty to the plaintiff, as required by law, and is not liable for the damages sustained by said plaintiff.

Third. The court further instructs the jury, that if you believe from the evidence that the locomotive engines of the defendant, run upon its road along and in close proximity to the plaintiff's property, were coal-burning engines, and were equipped with proper appliances to prevent the escape of fire, such as suitable and proper netting, cones, ash pans and dampers, and that in the construction of the smoke stacks of the defendant's locomotives the netting, or spark arresters, and other appliances to prevent the escape of fire, were of the kind or character that had been generally used upon railroads, upon coal-burning locomotives, and were extensively used at the time of the burning, and that in the construction, use and operation of said locomotives the defendant had exercised reasonable and proper care and diligence, then the court instructs you that the defendant would not be liable for the burning of the plaintiff's property, but that under the law such burning would be attributable to accident, for which there can be no recovery."

To these instructions the appellants excepted.

An instruction must be construed with reference to the facts in evidence before the jury. *Chi. W. D. Ry. v. Mills*, 105 Ill. 63.

It was proved conclusively by witnesses for both parties, that the construction of the straight stack was such that it caught and retained in the pocket a very large portion of the sparks that would escape or be thrown out from the diamond; indeed, from some of the testimony it might be argued that the difference would be as much as two bushels in every five miles of run.

If the jury had found for the appellees on the question of fact whether the fire was caused by a locomotive of the appellees, their verdict would probably have been conclusive; but although that question is left to the jury by these instructions it is quite probable that their verdict was based upon their

view of the compliance by the appellees with the law as to their duty laid down in the second and third instructions. With the evidence before them as to the superiority of the straight stack, they could not have found that the appellees had discharged their duty "to exercise reasonable care to prevent the escape of sparks and fire," "and that in the construction, use and operation of said locomotives the defendant had exercised reasonable and proper care and diligence" except upon the theory that the special circumstances affecting the appellees, the great number of their locomotives, the time and expense required to change all stacks, and the inconvenience by the interruption of business while making such change, excused the appellees in not having upon their locomotives the safest stack.

This theory makes the law for one railroad one thing, and for another, another. The law is not so flexible. It has one measure for all litigants. *Palm v. O. & M. R. R.*, 18 Ill. 217.

Whatever the mileage of a road, the number of its locomotives, or the magnitude of its traffic, if it burns up the property of an adjacent proprietor by sparks escaping from the stack of one of those locomotives, the road must show, as part of its justification or excuse, that it did "use every possible precaution, by the use of all the best and most approved mechanical inventions, to prevent loss from fire along the line of its road." *O. & A. R. R. v. Pennell*, 94 Ill. 448; *T. W. & W. Ry. v. Corn*, 71 Ill. 493, and many earlier cases.

This rule would be, in a case presenting that feature, qualified, no doubt, as stated in *O. & A. R. R. v. Hunt*, 24 Ill. App. 644. If it were shown that the means adopted in the particular case to prevent the escape of sparks, were used only by one road, but that in fact they were more effectual than those "most approved," it would be absurd to say that the road was negligent in using them. But it being shown that neither the best nor most approved were used, the loser of the burned property is not to be turned away by any excuse for the omission. If the road exposes the adjacent proprietor to peril from fire, which it might have avoided, it makes that peril its own.

It may not, because of the exigencies of its own business, inflict avoidable loss upon the owners of adjacent property. These instructions were erroneous in that they leave to the jury to find that the appellees had performed their duty by using means to prevent the escape of sparks not so good as the "best and (or) most approved."

If locomotive No. 554 set the fire, the appellees show no excuse.

The judgment is reversed and the cause remanded.

Reversed and remanded.

WILLIAM MCCOY

v.

CITY OF CHICAGO ET AL.

Municipal Corporations—Notices—Publication of—Injunction—Foreign Language—Constitution—Jurisdiction.

1. Questions involving the construction of the constitution without involving the validity of a statute, are within the concurrent jurisdiction of the Supreme and Appellate Courts.

2. Upon a bill filed by a taxpayer of the city of Chicago to enjoin it from entering into any contract for, or the paying of any money for publishing in the German language matters and things required by law or ordinance to be published in a newspaper, this court holds that under the State constitution, such publications must be in the English language alone.

[Opinion filed October 28, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. FRANCIS ADAMS, for appellant.

The publications in question are prohibited by the constitution. Section 18 of the schedule to the constitution is as follows: "All laws of the State of Illinois, and all official writings, and the executive, legislative and judicial proceedings shall be conducted, preserved and published in no other than the English language."

Matters, the publication of which is authorized or required by the city charter, are within the constitutional prohibition, as will be evident from examination of the charter. It is alleged in the bill and admitted in the answers that the city of Chicago, in May, 1875, became organized under "An act to provide for the incorporation of cities and villages," approved April 18, 1872. The following matters are required by that act to be published in a newspaper: All ordinances imposing any fine, penalty, imprisonment or forfeiture, or making any appropriation. *Starr & C. Ill. Stat.*, 474, par. 65. The city treasurer's annual report to the city council. *Ib.* 482 par. 98. The city collector's annual report. *Ib.* 483, par. 102. Notices of application for the confirmation of special assessments. *Ib.* 496, par. 143. City collector's notices of special assessment warrants in his hands. *Ib.* 500, par. 153.

Ordinances are clearly within the prohibition of the constitution. When passed in pursuance of authority conferred by the Legislature they are local laws, and are to be regarded as if passed directly by the State Legislature. *Dillon on Mun. Corp.*, 3d Ed., Sec. 308, and note 1; *Mason v. Shawneetown*, 77 Ill. 533, 537.

If not strictly "laws of the State," they are laws passed by the authority of the State, and are within the spirit of the inhibition. It is as necessary that inhabitants of the State, ignorant of the English language, shall have knowledge of the general laws of the State as of merely local laws, and it would be inconsistent, if not absurd, to interpret the constitutional provision as prohibiting the publication of the former in any other than the English language, and not of the latter.

An ordinance is not only a local law, but it is a "legislative proceeding," and as such, within the words of the prohibition. The reports of the city treasurer and city collector are "official writings," as are also the city collector's notices of warrants in his hands for collection.

Notices of application for the confirmation of special assessments are required to be given by the commissioners appointed by the court to make the assessment. The com.

missioners are officers of the court, and the notices are given in the course of "judicial proceedings," and are the process which gives the court jurisdiction to act in the premises. The publication of such a notice is, in contemplation of law, constructive service on the owners of the lots assessed. *Murphy v. People*, 120 Ill. 234, 236; *Murphy v. Peoria*, 119 Ill. 509, 513, 514.

The matters, therefore, required to be published by the city charter, are such that they can not, in view of the constitutional inhibition cited, be published by the city, at the expense of the taxpayers, in any other than the English language.

But the opposing counsel contends that the constitutional prohibition does not apply to the publications in question, and that the charter of the city authorizes such publications. It is therefore necessary to consider the charter provisions relied on.

Mr. A. F. STEVENSON, for appellees.

The publishing of council proceedings, notices, etc., in newspapers printed in the German language is not a new thing in this country; it is done in all large cities where there is a large number of German-American citizens, and so cheerfully has this kind of publication been acceded to by the English-speaking population that only two cases can be found in which this matter has been brought before the courts. They are found in *Watson v. City of Cincinnati*, 2 Cincinnati Sup. Ct., p. 84, and in *Kellogg v. City of Oshkosh*, 14 Wis. 632, in both of which cases the courts passed favorably upon the power of the common council to publish in newspapers printed in the German language.

It may also be urged that it has been the custom in this city and other places, for over thirty years, to publish these proceedings, notices, etc., in a newspaper printed in the German language; and if the Legislature had deemed it a wrong to taxpayers they could have passed laws long ago prohibiting such publication. But, on the contrary, the Legislature has passed acts from time to time indorsing such publication.

Dillon on Municipal Corporations, 3d Ed., Sec. 87, says: "It is a principle of very extensive operation that statutes of a general nature do not repeal, by implication, charters and special acts passed for the benefit of particular municipalities, but they do so when this appears to have been the purpose of the Legislature."

The same authority, in the latter part of Sec. 93, says: "But general and long continued usage is not without its importance, and usage of this character may be resorted to in aid of a proper construction of the charter or statute, but no further. If the language be uncertain or doubtful, a uniform, long-established and unquestioned usage will be regarded by the courts in determining the mode in which powers may be exercised, and to a reasonable degree in determining the scope of the powers themselves," * * * to which appears the following foot-note:

"When the true construction of a charter admits of doubt, and the construction adopted by the city authorities has been acquiesced in generally and acted upon by third persons in good faith in their transactions with the city, it will be precluded by the courts, in actions by such third parties, from denying its construction to be the true one." *Van Hostrup v. Madison City*, 1 Wall. 291.

GARY, P. J. This is a bill filed by a taxpayer of the city of Chicago to enjoin it from making any contract with the German-American Publishing Company, one of the appellees, for, or paying any money of the city to that company for publishing in the German language those matters and things required by law, or any ordinance of the city to be published in a newspaper.

The only question in the case is, whether the city has a right to expend the money of the city for that purpose. If it has no right to so expend the money, the right of the appellant to an injunction is beyond dispute. *Wright v. Bishop*, 88 Ill. 302, and many cases there cited.

In 1875 the city was incorporated under the act of 1872, provided for the incorporation of cities and villages. Before

such corporation Sec. 15, Chap. 3, of the Charter of 1863, contained a provision that the common council might in its discretion provide for such publication. By an act of March 9, 1867, it was provided that "the proceedings, notices and ordinances of the city and the departments, shall be published in the newspaper, printed in the German language, having the largest daily circulation in said city," etc. This act effectually repealed, by repugnancy, the former provision of the charter, by taking from the city all discretion as to such publication, either as to publishing at all, or in what paper. Then came the act of March 10, 1869, which required the common council biennially, on the second Monday in December, or as soon thereafter as might be, beginning in 1869, to designate the German newspaper for publication, etc. The only effect this act had upon the imperative provisions of the act of 1867, was to fix the time when the common council should designate the paper in which the publication should be made. None of these provisions are in form or substance, in whole or in part, incorporated in the general act of 1872. In various sections of that act, publication of ordinances, notices, etc., in a "newspaper" is required, but with no mention of the language in which that newspaper shall be printed. It is not a pertinent inquiry in this case, whether the general act of 1872 repeals the charter provision of 1863, as was held to be the case as to other special provisions in *Law v. People*, 87 Ill. 385, and *Cairo v. Bross*, 9 Ill. App. 406. It is too clear for argument that that provision, making this act discretionary, is superseded, and therefore repealed by the subsequent legislation, making the same act compulsory, and prescribing the manner and time of doing it, with restrictions added. From 1869 to 1875 the city could not have justified such publication, without complying with the acts of 1867 and 1869, by referring to the charter of 1863 as their authority, and the repeal of those acts did not revive the charter provision. The appellee's counsel concedes that the legislation of 1867 is inconsistent with the general law of 1872, and that concession carries the act of 1869 also.

The counsel, however, insists, that even if the charter pro-

McCoy v. City of Chicago.

vision of 1863 is not in force, yet, without any express power to be found in any legislation, the city has the discretion, because of the benefit, to publish in German, from the general powers conferred upon the common council by Sec. 63, Art. 5 of the act of 1872, and specially by clauses 94 and 96 of that section. Whatever might otherwise be the force of that argument it is met and overcome by the 18th section of the schedule of the constitution, that "all laws of the State of Illinois, and all official writings, and the executive, legislative and judicial proceedings, shall be conducted, preserved and published in no other than the English language."

It is true that this section would be an objection to the validity of the charter provision of 1863, if that had not been repealed by the acts of 1867 and 1869; and if there had been no such repeal, and if it was not repealed by the act of 1872, this court would have, under the law conferring jurisdiction, no power to decide the question; but the views already stated leave no such question in the case. Questions involving the construction of the constitution, without involving the validity of a statute, are within the concurrent jurisdiction of the Supreme Court, and of this court; of the Supreme Court by Sec. 88 of the Practice Act of 1872, and of this court by Sec. 8, as amended in 1887, of the Appellate Court Act of 1877. This section of the constitution has no reference to individual conduct. It is no restraint upon private enterprise.

The publisher of a newspaper in any language may translate and publish as much as he pleases of the laws, official writings, and executive, legislative and judicial proceedings in this State, without offense. But it is a restraint upon official conduct, and as stringent upon publishing as it is upon conducting and preserving such laws, etc. If the city may publish at public expense in German, why may it not pass ordinances and conduct its business in Greek?

This constitutional provision is the only express law on the subject; yet, if even the directors of a school district should attempt to keep their records in a foreign language, it would seem absurd to everybody. "Official," as an adjective, is derived from "office," as a substantive, and by the constitu-

tion, Sec. 24, Art. 5, "an office is a public position, created by the constitution or laws, continuing during the pleasure of the appointing power, or for a fixed time, with a successor elected or appointed." Every officer of the city is within that definition. *Wilcox v. People*, 90 Ill. 186.

Their acts as officers are official; the record of their acts as officers are "official writings," to be "preserved and published in no other than the English language."

The constitution of 1848 contained the same prohibition, and though the question might have been made long ago, it never has been; but no provision of the constitution becomes obsolete by neglect.

The decree of the Circuit Court dismissing the bill is reversed and the cause remanded, with directions to perpetually enjoin the city, as prayed in the bill, and that the appellant recover his costs. The costs both here and in the Circuit Court are to be paid by the German-American Publishing Company.

Reversed and remanded.

JOHN B. GEARY

v.

PAUL BANGS.

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Mechanic's Lien—Building Contract—Terms of—Payments—Action to Recover—Abandonment.

1. The mere fact that money which, according to the contract, is to be paid as fast as a given work progresses, is not paid by the owner, when, by the terms of the contract it ought to be, will not authorize the abandonment of the work and the recovery of a mechanic's lien for the work performed by the contractor, unless the payments are made conditions precedent to the performance of the work, by the express and positive provisions of the contract.

2. In order to obtain a lien the contractor must show that he has performed his contract or that he has been prevented from so doing by the act of the other party.

3. The failure to pay an installment when due is not such an act or omission as will prevent the contractor from completing his contract.

[Opinion filed October 28, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

This was a petition for a mechanic's lien, filed by defendant in error to recover for certain work performed under the following contract:

"This agreement, made this 12th day of June, A. D. 1888, between John B. Geary, party of the first part, and Paul Bangs, party of the second part, witnesseth:

For the consideration hereinafter mentioned, the said second party agrees to do all the carpenter work and furnish all the lumber and mill work necessary on the building, also the roof, cornice and gutters on said building, to be erected by said first party on 44th street near Vincennes avenue, Hyde Park, in accordance with the plans and specifications made by W. J. Eiler, architect, which are hereby made part of this contract; said work to be completed within sixty days from the date hereof. The said first party hereby agrees to pay to the said second party, for the work hereinbefore mentioned, the sum of twelve hundred and forty dollars; said sum is to be paid as the work progresses, as follows, to wit: Four hundred dollars to be paid when said building shall be under roof, and four hundred dollars to be paid when said building shall be ready for plastering, and the remaining four hundred and forty dollars to be paid when said building shall be finished."

Signed by the parties.

The petition alleged that Bangs commenced the work and so performed his part of the contract; that the building was ready for plastering on July 27, 1888; that Geary paid on said building \$400 when the roof was completed; that when the building was ready for plastering petitioner was entitled to receive \$400 more, but that said Geary paid, and would pay, only the sum of \$200, whereby petitioner was prevented from completing said contract. States petitioner had fully performed, up to the time of refusal of Geary, to pay additional \$200. Prays for a lien for the value of work done on the building, which remained unpaid for.

There was an answer to the petition, and on the hearing the court decreed a lien in favor of petitioner for the amount claimed, and said Geary brings the record to this court on error.

Messrs. W. S. HEFFERAN and JOHN R. GEARY, for plaintiff in error.

MR. LYMAN M. PAINE, for defendant in error.

MORAN, J. It appears from the evidence introduced at the hearing that a dispute arose between Bangs and Geary as to whether the building was ready for plastering at the time Bangs demanded the second payment of \$400. Geary paid \$200, and insisted that there was other work necessary to be done to get the building ready for plastering, and refused to pay the other \$200 until said work was done.

Bangs stopped work and Geary requested him to go on and complete his contract, and served a notice on him, requiring him to do so, but Bangs declined to go on because Geary would not pay the additional \$200 which he claimed to be then due, and abandoned the work, and Geary proceeded to complete the building by other workmen.

Granting that Bangs was right in his claim that the building was ready for plastering, and that the \$400 was due him, still, under the contract between the parties, he would not be entitled to a lien if he abandoned the contract on Geary's failure to pay it; whatever view may have been taken elsewhere, it is the rule in this State that the mere fact that money which is to be paid as fast as the work progresses, is not paid by the owner when, by the terms of the contract, it ought to be, will not authorize the abandonment of the work and the recovery of a mechanic's lien for the work performed by the contractor unless the payments are made conditions precedent to the performance of the work by the express and positive provisions of the contract. *King v. Sherman*, 28 Ill. 520; *Palm v. Ohio & Mississippi R. R. Co.*, 18 Ill. 217. The failure to pay an installment when due is not such an act or omission as will prevent the other party

Smith v. Hawkes.

from completing the contract. In order to obtain a lien the contractor must show that he has performed his contract, or that he has been prevented from so doing by the act of the other party. Defendant showed by his petition, as well as by the evidence introduced at the hearing, that he had abandoned his contract and refused to complete, and he has not shown what amounts in law to an act of prevention by the other party to it.

The court erred in decreeing the lien, and the decree must be reversed and the cause remanded with directions to dismiss the petition at the costs of defendant in error.

Reversed and remanded.

HOWARD F. SMITH

v.

MOSES A. HAWKES ET AL.

Contracts—Mines—Development of—Stock—Rescission and Return of—Consideration—Pleading—Parties.

Upon a bill filed to procure a rescission of, and likewise a return of certain mining stock delivered in pursuance of a contract entered into for the purpose of developing a mine, it being contended by the complainant among other things that one of the two joint promisors therein had failed to prosecute such development, this court holds that both should have been made parties defendant to such bill; that the one not named does not become a party by being called as a witness in behalf of the complainant; that said contract can not be made several by averments in the bill, or by evidence of conversations between the parties, and declines to interfere with a decree dismissing the same.

[Opinion filed October 28, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. GEORGE W. WILBUR, for appellant.

The decree should be reversed because the appellant had a right to rescind. *Wilson v. Roots*, 119 Ill. 379-386, etc.

Bannister v. Read, 1 Gill. 92-99, and cases there cited; Shelby v. Hutchinson, 4 Gill. 319; County of Clinton v. Ramsey, 20 Ill. App. 577; Thomas v. Coultas, 76 Ill. 493 (498); Cravener v. Hale, 27 Ill. App. 275; Shaffner v. Killian, 7 Ill. App. 620.

Appellant, having a right to rescind, had also a right to decree for re-transfer of the stock. Bispham's Eq. (4th Ed.), pg. 432-434; Doloret v. Rothchild, 1 Sim. & Stu. 590; Pooley v. Budd, 14 Beav. 34; 3 Pomeroy's Eq., 440-1, and notes.

Messrs. COOK & UPTON, for appellees.

There is no force in the excuse offered for leaving out Taylor, a joint obligor with the appellee, Hawkes.

As to Smith, the appellant, the undertaking of Hawkes and Taylor was a joint one, and it is simply absurd to insist, as appellant does, that Taylor has fully performed his half, and that Hawkes has done nothing in that direction.

The fact that Taylor and Hawkes, as between themselves, may have agreed that they would share equally in the undertaking, does not concern the appellant in the least, and all evidence offered by him tending to establish such an agreement between them, is wholly irrelevant to the issues.

Such an agreement would give Taylor the right to call on Hawkes for contribution, in case he had, as is claimed, done more toward the performance of the contract than Hawkes had, and the very fact that Taylor would have such a right, is a strong reason, it seems to us, why he should have been made a party defendant to the bill.

If, as is claimed, each was to perform one-half (or in any other proportion, as to that matter), and Taylor had done more than his half or his proportion, whatever it might be, and Hawkes had done less, would such a decree as is sought by appellant's bill in this case be a bar to a suit by Taylor against Hawkes, for contribution, Taylor not being a party to or bound by said decree? If not, that fact forcibly illustrates the necessity of making Taylor a party.

That Taylor was a necessary party, see Story's Equity Pleadings, Sec. 169; Bland v. Winter, 1 Simons & Stuart, 247.

GARY, P. J. The appellant filed his bill against the appellee Hawkes only, but by a supplemental bill brought in as a defendant one Alley, of whom no further notice need be taken. The object of the bill was to procure a rescission of one-half of, and the return of one-half of the stock delivered in pursuance of a contract as follows:

"Memoranda of agreement made this 21st day of July, A. D. 1886, between M. A. Hawkes and J. V. Taylor, both of Evanston, Cook County, Illinois, as parties of the first part, and Howard F. Smith, of Denver, Arapahoe County, State of Colorado, as party of the second part, witnesseth:

"That for and in consideration of the transfer to said parties of the first part of twenty-five thousand and sixty shares of the capital stock of the Ruby Chief Mining and Milling Co., or causing the transfer to said first parties of such amount of stock in said company, the parties of the first part agree to make no demand on said party of the second part for any indebtedness, present or to come, nor upon the remaining shares of the capital stock standing, after such transfer, in his name on the books of the company, and they agree to prosecute the development of the property of said company at their own risk, for a reasonable time, as they shall consider best for their mutual interests, till satisfied of the futility of further endeavors to make the property yield revenues, without large expenditures. In case the property becomes profitable the parties of the first part agree to pay to said party of the second part, his heirs or assigns, one-eighth of any such profits to the amount of twenty thousand dollars (\$20,000), but only after the quarter of such profits shall have paid them the sum of forty thousand dollars (\$40,000).

"Also in case they sell any of the stock that shall then stand in either of their respective names, they shall consider themselves to have parted with a proportional amount of the twenty-five thousand and sixty (25,060) shares above named, as that stock shall be to the whole number of shares standing in their respective names, and on and after the sale of such proportion of stock shall have netted them the sum of forty thousand dollars (\$40,000), then they will pay said

second party the one-half received from the sale of this above-said quarter of the capital stock, till such receipts have been paid to him to the amount of twenty thousand dollars (\$20,000), and no longer.

"It is further mutually agreed and understood between the parties of the first and second part that the said Hawkes and Taylor shall be allowed to use their best judgment and abilities in carrying out all the conditions of this contract.

"In witness whereof, we have herenunto set our hands and seals this 28th day of July, A. D. 1886.

"M. A. HAWKES,

"J. V. TAYLOR,

"HOWARD F. SMITH."

To such a bill Taylor is a necessary party. Acts in performance of the contract done by either Taylor or Hawkes, were, as to the appellant, done by both. The contract on the face of it, is joint as to them and can not be made several by averments in the bill, or by evidence of conversations between the parties—at least, in a suit to which Taylor is not a party. No decree in this suit will be a bar to any relief Taylor may claim against Hawkes, nor any evidence of facts inconsistent with such claim. The rule which makes Taylor a necessary party, and the reason for it, are stated in 1 Dan. Ch. 190; Story, Eq. Pl., Sec. 72. Taylor does not become a party by being called as a witness on behalf of the appellant. If he seeks any relief against Hawkes, he must put himself on record as complainant. The ground upon which a rescission as to Hawkes, and a return of half the stock is claimed, is, that Hawkes has failed "to prosecute the development of the property of the company," as the contract provided, and has attempted to obtain an unjust judgment against the company.

The contract left to the discretion of Taylor and Hawkes as their own interests might indicate, the extent to which they would so "prosecute." That promised prosecution was not the sole consideration on their part. The appellant and such stock as he retained were discharged from some indebtedness. Doubtless the successful working of the mines was a condition precedent to such a state of affairs as would ever entitle the

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appellant to the contingent profits or proceeds of sales of stock contemplated by the contract; but Taylor and Hawkes as to such working were left to the exercise of their own judgment. The contract assumes that desire and hope of gain for themselves would be a sufficient incentive to any prudent expenditure. The decree dismissing the bill is right and is affirmed.

Decree affirmed.

ALEXANDER J. ALEXANDER
v.
C. E. MANDEVILLE.

Master and Servant—Negligence of Servant—Personal Injury to Third Person—Master's Liability—Practice—Independent Contractor—Evidence—Instructions.

33	589
50	517
33	589
50	488

1. The admission of incompetent evidence not made the subject of exception, can not be assigned as error.

2. The rule touching the non-liability of a master for the negligence of an independent contractor in his employ, is not affected by the fact that the contractor is paid the cost of the work and a given per cent instead of a fixed price.

3. If it appears in evidence in an action brought for the recovery of damages for an injury alleged to have been occasioned through the negligence of servants of the defendant, that several sets of men were engaged upon the premises in question when the accident occurred, and it is left to the jury to infer the cause of the injury, the fact being that for one set of the men the defendant was in no wise answerable, he is entitled to an instruction setting forth such fact.

4. It is proper for a trial court to give one connected charge in lieu of separate instructions asked by the parties, provided that such charge embraces all that the parties ask to which they are entitled.

5. An instruction of this character, which directs the attention of the jury away from the issue one of the parties has a right to present, is erroneous.

6. In such case, a contractor should narrate what happened in the making of his contract, and the conduct of the work, from which the jury must infer whether he acted independently of his employer or not.

7. It is proper to refuse to allow a party to examine at length, as his own witness, a person whom his adversary has called and examined as to the same matter, and whom the first party had an opportunity to cross-examine as to every circumstance. Additions to and explanations or qualifications of the testimony in chief, when part of the same transaction, should be brought out by cross-examination.

[Opinion filed Oct. 28, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. OSBORNE BROTHERS & BURGETT, for appellant.

In *Glickauf v. Maurer*, 75 Ill. 289, the question of "independent contractor" did not arise. The tenant of first story was entitled to have above him protection from storms. "It would be a strange doctrine, indeed, to hold that appellants could lease the first story of a building to appellee and receive the rent, and then employ a carpenter (under any sort of contract) to remove the roof, in consequence of which a valuable stock of goods should be destroyed, and then take refuge behind the men they had caused to do an act from which the damage resulted." (p. 291.) It was immaterial who was in possession of the upper stories. The landlord was under a duty to his tenant that he could not escape by any kind of contract with the men employed to put on the new roof.

In *Schwartz v. Gilmore*, 45 Ill. 455, the court used language (not called for by the case) which has been strongly criticised, and which is not law in Illinois nor elsewhere. See 2 Thompson on Negligence (4th Ed.), 913, 914. The facts involved in *Daegling v. Gilmore*, 49 Ill. 248, were the same as in *Schwartz v. Gilmore*, 45 Ill. 455. And if these two cases are carefully read, it will be seen that, in *Schwartz v. Gilmore*, the plans of the building were defective, and that the accident occurred by reason of defect in the plans rather than by the manner of doing the work. See 2 Thompson on Negligence, 900. Where plans are defective the owner will be liable for injury in consequence of the falling of the building, whether the

actual construction of the building is done by an independent contractor or not. *Hollenbeck v. Winnebago Co.*, 95 Ill. 148, 156-8; *City of Joliet v. Harwood*, 86 Ill. 110. In *Railroad Co. v. Hanning*, 15 Ill. 649, the contractor agreed "to build it (the wharf) with such mooring posts, cluster-piles, etc., as the company, through their engineer, may require, making the old wharf as good as new; * * * to submit to the supervision and direction of the engineer of the company, and to do the work to his satisfaction." Judge Hunt says: "They (company) may direct the number of mooring posts, cluster-piles, etc. * * * They are at liberty to direct how much material shall be used, and how it shall be laid to make the old wharf as good as new. They are to supervise the work to be done. They are to direct how it shall be done."

There is a doctrine peculiar to Massachusetts, and in looking at the decisions of its courts, that fact must be borne in mind. Such doctrine is this: It is there held that a builder is a mere servant, and not an "independent contractor," unless he agrees to do the work for a *specific* and *fixed* sum of money named beforehand. *Forsyth v. Hooper*, 11 Allen, 419; *Brackett v. Lubke*, 4 Allen, 138; *Conners v. Hennessy*, 112 Mass. 96.

In *Linnelhan v. Rollins*, 137 Mass. 123, Elston was employed "to take down the entire building * * * or so much thereof as the trustees (defendants) may request. * * * All of said work to be done * * * under the direction and subject to approval of said trustees." The jury were instructed: "This contract gives the defendants the right to control and direct the action of Elston. It is not simply a provision that the work must finally meet with their approval before they pay him, but it is a provision that in the first instance he is to take down just so much of it as they desire, and that he is to do the work of taking down under their direction. There is no other mode of construing it than so as to mean that he, by his contract, was subject to their order as to the time and manner and mode of doing the work, and that they had a right to step in and say to him, 'You are not doing this as we directed you to do it. We direct you to do thus

and so, and we direct you to do this in the other way.” On appeal the exceptions to the charge to the jury were overruled.

Whether an owner of a building retains control over work to be done, and the manner of doing it, so as to render himself liable for injuries occasioned by the negligence of a contractor and his employes in the performance of the work—that is, whether the contractor is an “independent contractor”—depends upon the construction to be given to the contract by the court. *Linnehan v. Rollins*, 137 Mass. 123, 125-6, and cases cited.

In *Clapp v. Kemp*, 122 Mass. 481, the jury were simply told that, if the defendants “had the right to direct or control the mode or manner of such delivery (of the coal into the cellar), then the teamster would be the servant of the defendants.”

In *Stone v. Codman*, 15 Pick. 297, “it appeared that the defendant employed one Lincoln, a mason, to dig and lay a drain from the defendant’s stores * * * into the common sewer; and that by reason of the opening made by Lincoln and the laborers in his employment, water was let into plaintiff’s cellar, and his goods were wet.” (p. 297.)

In *Hilliard v. Richardson*, 3 Gray, 349, 351, the court says that in *Stone v. Codman*, “There was no contract, written or oral, by which the work was to be done for a specific price or as a job. The case is expressly put upon the ground that between the defendant and Lincoln the relation of master and servant existed. * * * The work was under the control of the defendant. He could change, suspend or terminate it at his pleasure (and without liability to Lincoln). * * * The work was done by Lincoln, not on his own account, but on the defendant’s. The defendant was, indeed, acting throughout by his servants.” (pp. 351-2.)

In *Brackett v. Lubke*, 4 Allen, 138, a carpenter was employed to repair an awning. “At the trial * * * it appeared that * * * the defendants, being desirous of having one end of it (the awning frame) moved along six or eight inches, * * * engaged a carpenter to do the work, and, having told him what they wished to be done, gave him no further

directions." The court said: "The defendants are liable because it appears that the negligent act which caused the injury was done by a person who sustained toward them the relation of servant. There was no contract to do a certain specific job or piece of work in a particular way for a stipulated sum. It is the ordinary case where a person was employed to perform a service for a reasonable compensation. The defendants retained the power of controlling the work. They might have directed both the time and manner of doing it." See *Shearman & Red.* on Neg., 54th Ed. Sec. 165.

In *Bernauer v. Hartman Steel Co.*, 33 Ill. App. 491, this court said: "The terms of the employment of Ruh are not given, and it must, therefore, be assumed that no special terms were agreed on. He was employed generally to do the required work. * * * His employer had the right to control and direct the entire work, and might have discharged Ruh from the employment if he refused to obey her instructions. The character of his employment bears no resemblance to that of an independent contractor."

The question of the extent of injury and damage to appellee is not to be determined by the appearances directly after his injury, but what were the extent of his injuries as shown during the two years that elapsed between the accident and the trial.

Messrs. E. H. & N. E. GARY, for appellee.

"If the employer reserves control or supervision over the mode and instrumentalities for doing the work, as if the work is to be done according to the direction of his architect or according to the directions of the employer himself, or if he in any manner reserves such control over the work, by himself or by his agent, as gives him authority to direct how the work shall be done, during its progress, so that the contractor and his workmen can be said to stand in the relation of servants to him, he is liable for their negligence." *Wood's Master and Servant*, 613.

"The fact that the employer reserves the right to change the plan of doing the work, or that the work shall be done

to the satisfaction of the employer, or of an agent appointed by him, or that the employer reserves the right to discharge any of the contractor's men, does not affect the question. The simple test is, who has the general control over the work? Who has the right to direct what shall be done, and how to do it? And if the person employed reserves this power to himself, his relation to the employer is independent and he is a contractor; but if it is reserved to the employer or his agents, the relation is that of master and servant. The contract being to do a certain piece of work, the mode of payment does not affect the relation." *Wood's Master and Servant*, 614.

"Where a landlord occupying the upper story of a building employed a mechanic to put in a sky-light in the roof, who neglected to cover the same, so that it rained through the opening and thereby damaged the goods of a tenant occupying the first floor, it was held that the landlord was liable to the tenant for the negligence of the mechanic in doing the work. This case is distinguished from *Scammon v. City of Chicago*, 25 Ill. 424, as there the owner gave the entire possession and control of the premises to the contractor." *Glickauf v. Maurer*, 75 Ill. 289.

Where the employer and owner of property employed a builder to erect a building thereon, who, by the terms of the contract, was to carry forward the work under the control of a superintendent, and "to remove all improper work or materials upon being directed to do so by the superintendent," to whose judgment, both as to work and materials, he agreed to submit, and whose acts the owner agreed to recognize, and the owner also reserved the right to change the plan, and the architect was declared to be the superintendent for the owner, *held*, "that the owner had not so far given to the contractor all control over the work and the premises as to be relieved himself of all responsibility for the injuries caused by the contractor's negligence." *Schwartz v. Gilmore*, 45 Ill. 455.

In *Linnchan v. Rollins*, 137 Mass. 123, a carpenter entered into a written contract with the trustees of an estate, by which he agreed "to take down the entire building known as the

Adams House in said Boston, belonging to said trustees, or so much thereof as the trustees may request," and which also provided as follows: "All of said work to be done carefully and under the direction and subject to the approval of said trustees." There was evidence to show that the plaintiff was injured through the negligence of the workmen employed by the carpenter under the contract. It was held that the trustees were liable for the injury so received.

"The defendants, if they were occupants of the store, would not be liable for the negligence or carelessness of the teamster, if, as the servant of Armor, he had the exclusive possession or control of the premises as far as was necessary to enable him to deliver the coal. But if the jury are satisfied that the defendants were at the time the occupants of the store, and, as such occupants, had the right to direct or control the mode or manner of such delivery, then the teamster would be the servant of the defendants, so as to render them liable for injuries occasioned by his negligence or carelessness in the delivery of the coal." *Clapp v. Kemp*, 122 Mass. 481; see *Bernauer et al. v. Hartman Steel Co.*, 33 Ill. App. 491.

GARY, P. J. The appellant and Mrs. Leiter owned buildings in the city of Chicago, separated by a party wall. They joined in erecting another story upon them, and employed Mr. Baumann as architect. He made plans, and Barney & Rodatz, a firm of masons, contracted with the owners, separately, to do the mason work on the buildings, furnishing their own materials and labor, to be paid therefor the cost, with ten per cent. added. The owners, by their agents, employed their own carpenters, superintended by their own foreman, to do the necessary carpenter work.

Barney & Rodatz had their own foreman on the work, under whose directions their men worked when Rodatz was not present. Barney took no part in the work, only going to it on pay days, to pay the men. The architect, by his plans and verbal instructions, directed what work should be done, and decided upon its sufficiency as done. In the afternoon of April 20, 1886, a mason's "horse," used for scaffolding, placed

on the roof of appellant's building by Barney & Rodatz, from a cause not shown by any direct evidence, fell from the roof to the sidewalk in front of the building, striking and injuring the appellee.

He sued both owners and the masons. On the trial the appellee obtained a verdict against the appellant only. It is not now necessary to decide whether the relations between the appellant and the masons were such as to make him responsible for negligence of their workmen, if such negligence was the cause of the accident. If the masons had been contractors for a fixed price, it would be difficult to fix responsibility upon the appellant under all modern authority.

The principle adopted in the old case of *Bush v. Steinman*, 1 Bos. & Pul. 404, that "he who has work going on for his benefit and on his own premises, must be civilly answerable for the acts of those he employs," has, in its application to the acts of independent contractors, been rejected, probably, by every court that has mentioned the case in the last half century. And that the contractors are paid cost and a per cent instead of a fixed price, makes no difference. *Hale v. Johnson*, 80 Ill. 185. There was evidence tending to show that there were upon the roof, when the "horse" went over, a carpenter, a laborer of the masons, and some telephone men doing something about wires which had been extended across, but not attached to, the appellant's building. There was a good deal of incompetent evidence as to the acts and declaration of divers persons after the accident, tending to show, and probably fairly showing, that the general opinion of all persons most nearly connected with the events was that the act of the laborer was the cause of the "horse" falling.

The appellant was a non-resident, not present during the progress of the work, or at the time of, or after the accident. He is not to be affected by that opinion, but is entitled to an impartial finding of a jury upon original evidence of the events.

That incompetent evidence, however, is not made the subject of exception by the appellant, and its admission can not be assigned as error. It is alluded to only as indicating that

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the importance of the instruction asked by the appellant and refused by the court was obscured by the general belief that the laborer was the negligent person. That instruction was as follows: "If the jury believe from the evidence that the injury to the plaintiff, complained of here, was caused by the act or negligence of certain man or men in removing or changing the position of certain telephone or telegraph wires, and that such man or men was not, or were not, the agent or agents of the defendant, Alexander, or in his employ or service in doing such work, then the jury should not find a verdict against Alexander, but should find him not guilty."

The refusal can not be justified on the ground that there was no evidence to base it upon. The telephone men were not witnesses, and the laborer was not examined on the point of what caused the horse to fall. Why it fell is left wholly to inference from circumstances. The laborer was removing scaffolding which was in part supported by the "horse." What the telephone men were doing does not so clearly appear.

The burden of proof was upon the appellee. If the jury were to infer from the presence and employment of different men what act caused the "horse" to fall, and if for the acts of one set of men the appellant was in no event answerable, he was entitled to an instruction covering the point. See *Riedle v. Mulhansen*, 20 Ill. App. 68, and many cases there cited; especially *P. M. & F. Ins. Co. v. Anapow*, 45 Ill. 86, and *Wooters v. King*, 54 Ill. 343.

The court gave no instructions asked by any of the parties. If any other party than the appellant asked any, the record does not show it. But if they did, one connected charge, as was given in this case, in lieu of separate instructions asked by the parties, is good practice, provided that such charge embraces all that the parties ask, to which they are entitled. *Hanchett v. Kimbark*, 118 Ill. 121. So much of the charges as relates to the present question is as follows:

"If you find from the evidence that none of the defendants were personally guilty of negligence, but that some of the workmen on the building, while in the scope of their employ-

ment, were guilty of negligence, as charged in the declaration, and that such negligence caused the accident, and that such workmen were employes of either of the defendants, then you will determine* from the evidence whether such workmen were the employes or servants of the owners of the buildings or the employes and servants of Barney & Rodatz. This involves the question whether Barney & Rodatz were doing the work on these buildings as independent contractors having sole charge of the mason work, and the sole right to hire and discharge the workmen engaged thereon, or whether they were simply acting as superintendents for the owners, and were themselves simply such employes or servants of the owners. Upon this point you are instructed, as a matter of law, that one who contracts to do a piece of work, and to furnish his own assistants, and to execute the work either entirely according to his own ideas, or in accordance with the plans previously furnished him by the person for whom the work is to be done, and without being subject to the orders of the person for whom the work is done, in respect of the details or manner of doing the work and having the sole right to hire and discharge assistants, such a person is a contractor, and not a servant or an employe.

“ On the other hand, if the person for whom the work is done has a right to direct the details or manner of doing the work, from time to time, and to say who shall and who shall not work on the job, then the person for whom the work is done must be regarded as the employer, and those doing the work as his employes, and in that case it is immaterial whether the person for whom the work is done actually exercises the right to direct the details or manner of doing the work or not; nor will it in that case make any difference whether he actually interferes in the hiring or discharging of men or not; it is sufficient if he had the right to do it.

“ Therefore, in this case, if you find from the evidence that such workmen or persons causing the accident were not guilty of negligence, or if guilty of negligence that they were not the employes of any of the defendants in this case, then you will find all defendants not guilty. If, however, you find from the evi-

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dence that such workmen were guilty of negligence, that this negligence caused the accident, and that such workmen were the servants or employes of Barney & Rodatz, acting in the line of their employment, then you will find the defendants Alexander and Mrs. Leiter not guilty, and return a verdict of guilty as to Barney & Rodatz.

“On the other hand, if you find, from the evidence, that such workmen were guilty of negligence, that such negligence caused the accident, and that such workmen were, at the time of the accident, the employes of the owner or owners of the buildings, acting in the line of their employment—that is, that the owner or owners had the right to direct the manner of doing the work, and to say who should and who should not work on the job, then you will return a verdict of not guilty as to Barney & Rodatz; and, in that case, you will further determine from the evidence whether the defendants, Alexander and Mrs. Leiter, through their agents, were doing the work jointly—that is, in so far as the control of the employes was concerned—and whether such workmen at the time of the accident, were the employes of them both, to the extent of being under their control, and, if you so find, then you will return a verdict of guilty as to both Alexander and Mrs. Leiter.

“If, however, you find from the evidence that they were doing the work separately, and that neither had any control over the workmen engaged on the building of the other, and that said workmen were at the time of the accident the employes of Alexander alone, then you will return a verdict of not guilty as to Mrs. Leiter, and a verdict of guilty as to Alexander.”

This charge does not, in terms, assume that it was the laborer who caused the “horse” to fall, and though, as a legal proposition, as it would be understood by lawyers (*Nichols v. Mercer*, 44 Ill. 250), a phrase or two in it would cover the point in the refused instruction, it was certainly liable to be misunderstood by the jury. It begins with the idea that “workmen on the building” caused the accident, and carefully informs the jury how they are to determine whether those workmen were

employed by the owners or the masons, and in no way alludes to the telephone men. By the whole tenor of the charge, the jury would be led to think only of the men employed in making the addition to the building, and of the relations of the several defendants in the suit to those men. It directed their attention away from the issue the appellant had a right to present. *Trustees v. McCormick*, 41 Ill. 323.

The refused instruction was not objectionable on the score that it was based upon an isolated fact. If that fact were found by the jury it would be a complete defense in itself, not subject to any qualifications by anything else in the case. As the judgment must be reversed for refusing this instruction, without putting the same matter clearly before the jury in any other shape, the evidence has not been reviewed at the length that would be necessary if the decision was based upon it. The same may be said of some other complaints of the appellant.

Rodatz was permitted to testify, over the exception of the appellant, that "he hired the men to work for Leiter and Alexander;" that he "had no control of anything." These were only his conclusions. His testimony should have been confined to a narrative of what happened in the making of his contracts, and the conduct of the work, from which the jury were to draw their conclusions.

Whether the evidence as to the extent of the injury to the appellee justifies the damages for which judgment was rendered is a point not considered.

On the point of practice, that the appellant was not permitted to examine at length, as his own witness, a witness whom the appellee had put upon the stand and examined as to the same matter, and whom the appellant had then the opportunity to cross-examine as to every circumstance, the course adopted by the Superior Court was correct.

Additions to, and explanations or qualifications of, the testimony in chief, when part of the same transaction, are to be brought out by a cross-examination.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Ruffner v. Love.

FRANK W. RUFFNER

v.

JOHN W. LOVE.

33	601
68	27
33	601
66	348
66	499
33	601
86	228

Sales—Guaranty of Payment by Third Person—Acceptance—Evidence—Instruction.

1. Where there is a mere proposal by one to guarantee the performance of an undertaking by another if credit be extended to such other, the contract of guaranty is not complete till the credit is extended and notice given of the acceptance of the guaranty.

2. Such notice need not be given in writing, or be in any particular form, but may be inferred by the jury from facts and circumstances warranting the same.

3. In an action brought for the recovery of the price of certain goods alleged to have been sold third persons on the strength of a guaranty given by the defendant, this court holds that on account of the giving of an erroneous and misleading instruction the judgment for the plaintiff can not stand.

[Opinion filed October 28, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. GAETSIDE & LEFFINGWELL, for plaintiff in error.

Messrs. HOYNE, FOLLANSBEE & O'CONNOR, for defendant in error.

MORAN, J. This action was brought to recover against plaintiff in error for goods sold to the firm of Ruffner & Somes, on a guaranty alleged to have been made by plaintiff in error. The entire evidence in the case consisted of the deposition of defendant in error, and certain letters and a statement of accounts attached to said deposition as exhibits. The Ruffner who was a member of the firm of Ruffner & Somes, was a son of the plaintiff in error. Prior to the formation of said firm, plaintiff in error had been, it seems,

carrying on a cigar business, and had been dealing with Love, the defendant in error. January 11, 1882, Love had a conversation with plaintiff in error, W. F. Ruffner, at the store of Ruffner & Somes, in Chicago, in which said Ruffner desired Love to sell Ruffner & Somes cigars, and said that if Love would give them a line of \$5,000, he would be responsible for the amount, and if they at any time failed to pay any portion of their indebtedness to Love, he would pay it himself, and also said that he was leaving his capital in the concern of Ruffner & Somes. It does not appear that there was any further attention paid by either party to this talk, though from the account it appears that Love commenced to sell goods to Ruffner & Somes on said January 11, 1882, and continued through several months thereafter, till the termination of the dealing between them. It is shown, we think very clearly, that the goods sold by Love to the firm during the months of January, February and March, 1882, were not sold on the credit of F. W. Ruffner, as we find written at the foot of an order for a bill of goods sent by Ruffner & Somes to Love, dated April, 1882, the following, bearing date April 8, 1882: "I will be responsible for above order. F. W. Ruffner."

There was introduced in evidence by Love to sustain his claim of guaranty, the following:

A letter dated Chicago, April 3, 1882, as follows:

"JOHN W. LOVE, Esq.:

"I shall leave my capital in Ruffner & Somes until further advised; in meantime will be responsible for \$4,000 for them from this date.

"Yours respectfully,

"F. W. RUFFNER."

A letter from Love to Ruffner & Somes as follows:

"NEW YORK, June 1, 1882.

"MESSRS. RUFFNER & SOMES, Chicago, Ills.

"*Gentlemen:*—I have at hand your order through Mr. Richey, for 5 M 'Princess' 1-40 with bands at \$65; 5 M 'Princess' 1-40 without bands at \$62.50, and 5 M 'Opera' at \$30, to be shipped at once, and 5 M 'Princess' 1-20 at \$61, and 5 M 'Calcutta' at \$51, to be shipped June 10th to 15th.

Ruffner v. Love.

I telegraphed you last evening that I would ship your order and write you fully to-day. I will ship the 5 M 'Princess' with bands, and 5 M without bands, and 5 M 'Opera' this p. m., or to-morrow morning, and others at time specified.

"Now gentleman, I am willing to renew my offer to give you a \$5,000 line of credit (and go in to stay this time) upon the conditions agreed upon between yourselves and Mr. Richey, which are, as I understand them, as follows: I am to supply you with such brands or grades of goods, 'Princess,' 'Gibraltar,' 'Calcutta' and 'Opera,' to the amount of \$5,000, on the regular terms of four months' acceptance, or cash, less 4 per cent, if you should at any time desire to discount your bills, and Mr. F. W. Ruffner is to give me an agreement in writing that he will be responsible to me for purchases which you may make from me, to the amount of \$5,000, and that he will not guarantee or make himself responsible for your indebtedness to any other parties besides myself. Please request Mr. F. W. Ruffner to send me an agreement to that effect, and I will return his previous agreement dated April 3, '82. You may rest assured that I will try to perform my part well by giving you the very best goods I possibly can.

"Very truly yours,
J. W. LOVE."

A further letter from Love to Ruffner & Some, as follows:

"NEW YORK, June 12, 1882.

"MESSRS. RUFFNER & SOME, Chicago.

"*Gentlemen*:—I have not as yet heard anything from Mr. F. W. Ruffner in regard to the guaranty which I desire him to give me, about which I wrote you fully on the 1st inst.

"Very respectfully,
"JNO. W. LOVE."

The above was inclosed in a letter from Ruffner & Some, and returned to Love, with the following written on the same paper underneath what Love had written:

"CHICAGO, June 20, 1882.

"JNO. W. LOVE, Esq.

"*Dear Sir*:—I have been in the country for some time, and

on my return find the above letter. I propose, as I said at first, to be responsible for Ruffner & Somes for four thousand dollars (\$4,000) and no more.

“Very resp’y,

“F. W. RUFFNER.”

A letter from Ruffner & Somes was:

“CHICAGO, June 20, 1882.

“JOHN W. LOVE, Esq.

“No. 5, Rivington St., New York.

“*Dear Sir:*—Enclosed we hand you guaranty from F. W. Ruffner, Esq., for \$4,000 for our account. This we could not send you sooner on account of his absence. He has not nor will not guarantee our acc’t with any one else excepting yourself.

We are much in need of the Calcutta ordered, and would thank you to hurry them as much as possible.

Yours truly,

“RUFFNER & SOMES.”

Ruffner & Somes continued to deal with Love till October 28, 1882, having purchased in all upward of \$8,900 dollars worth of goods, and paid on account from time to time, something over \$7,300 leaving a balance due Love of \$1,508, to recover which this action was brought.

No communication, verbal or written, having reference to this account, took place between Love and F. W. Ruffner from the letter of June 20, 1882, till February 20, 1886, when a copy of the account was sent to Ruffner by Love, with a demand for its payment. There was a verdict and judgment for the claim in the Superior Court, and Ruffner has brought the record to this court and assigns several errors.

The question presented is whether the written guaranty signed by F. W. Ruffner, and dated June 20, 1882, became binding upon him without notice to him of its acceptance by Love. That guaranty is in form personal and is so expressed. It was written by Ruffner with the knowledge that Love had requested from him an agreement in writing that he would be responsible to the amount of \$5,000, and that he would not make himself responsible for Ruffner &

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Somes' indebtedness to any other party. He knew that he had, on April 3d, written a guaranty to the amount of \$4,000, and that said guaranty had not been accepted and was not satisfactory to Love, and knowing this, he makes his offer definite and clear in the statement: "I propose, as I said at first, to be responsible for Ruffner & Somes, four thousand dollars and no more." That is as if he had said, "I offered before to guarantee to the extent of four thousand dollars; I now find your letter requesting me to guarantee you to the amount of five thousand dollars, and to agree to guarantee no one else; I will not do so, but propose to you as I did before, to be responsible for the firm for four thousand dollars and no more." This is very different from what was done in the case of *Cooke v. Orne*, 37 Ill. 189, cited and relied on by counsel for Love. There the parties who sold the goods wrote to the parties who desired to purchase, proposing to sell the goods on notes of the said purchaser, two of the notes to be indorsed by Cooke; the said purchaser wrote a letter in reply accepting the proposition, and to this letter Cooke added a postscript, *also accepting, and stating that he would indorse the notes as proposed*. The contract of guaranty arises from an agreement between the guarantor and guaranteee. It may be, and often is, founded exclusively on a consideration moving from the guaranteee to the principal debtor or person to whom credit is to be extended, but otherwise it is distinct from the principal contract.

It is essential to the formation of this, as well as of all other contracts, that the minds of the parties shall meet.

Where there is a mere proposal by one to guarantee the performance of the undertaking by another, if credit be extended to such other the contract of guaranty is not complete till the credit is extended and notice given of the acceptance of the guaranty.

The assent of the party to whom the proposal is made must be signified to the party making it in order to constitute a binding promise. Treating Love's letter of June 1st as a request for a guaranty, the question whether such request was assented to by Ruffner was a question of law for the court,

to be determined by a construction of the writings of the parties, and the court should have ruled that there was no agreement by Ruffner to guarantee as requested in Love's letter. The court instead of so ruling, gave the following instruction to the jury:

"You are instructed as a matter of law, that when a person asking a guaranty writes to the proposed guarantor offering to sell to another on his guaranty, and the guarantor replies that he will so guarantee, the contract is complete, and the vendor need not further inform the guarantor of the sale made thereunder; and if you believe, from the evidence in this case, that the plaintiff therein on or about the first of June, 1882, wrote to the firm of Ruffner & Somes, offering to sell to them upon the guaranty of said defendant, which letter was called to the attention of the said defendant, and that he replied that he would be responsible for them for \$4,000, which guaranty was accepted by said vendor, the said contract is thus complete and the vendor need not further notify the guarantor of the sales made thereunder." This instruction was erroneous and misleading. The first clause of it which states the rule of law supposes facts wholly different from the facts in this case, and if the instruction had gone no further its tendency would be misleading. But the latter clause of the instruction is still more faulty. Love's offer to sell was in writing, and it was not for the jury to determine whether it amounted to a general proposition to sell on the guaranty of defendant. It misrecites defendant's reply, and assumes as proved a fact which it was essential for the jury to find under the evidence in the case, to wit, whether defendant's guaranty of \$4,000 was accepted by the vendor.

We are of opinion that Ruffner's letter of June 20th was a mere overture or proposition to guarantee, and that the question for the jury to find was whether the proposition was accepted, and whether Ruffner had notice of such acceptance.

That there must be notice to the guarantor of the acceptance of such a guaranty is settled beyond dispute by the authorities. *Newman v. Streator Coal Co.*, 19 Ill. App. 594,

Kirchoff v. Union Mutual Life Ins. Co.

and cases there cited; Wells v. Davis, 104 U. S. 159; Davis Sewing Machine Co. v. Richards, 115 U. S. 524; Gardner v. Loyd, 110 Pa. St. 278.

"The notice need not be proved to have been given in writing or in any particular form, but may be inferred by the jury from facts and circumstances which shall warrant such inference." Reynolds v. Douglas, 12 Pet. 497; Powell v. Chicago Carpet Co., 22 Ill. App. 409. The judgment must be reversed and the case remanded.

Reversed and remanded.

ELIZABETH KIRCHOFF

v.

THE UNION MUTUAL LIFE INSURANCE COMPANY.

Trust Deeds—Foreclosure—Redemption as to Part in Conformity with Agreement.

1. When a mortgagor has conveyed the mortgaged premises to the mortgagee it only operates as a bar to the equity of redemption, where it clearly and unequivocally appears that both parties so understood and intended it should.

2. When by the operation of law upon the facts, or by the agreement of the parties, a mortgage debt has been apportioned, and a part of it made the sole burden upon a part of the incumbered property, that part may be redeemed by paying the portion of the debt apportioned thereto.

3. Upon a bill filed to redeem certain property to which defendant acquired the legal title under a quit claim deed from complainant and her husband, and under certain foreclosure proceedings under a trust deed to which complainant was a defendant, instituted prior to said quit claim deed, and carried to decree and sale subsequent thereto, it being contended by said complainant that her offer to release and quit claim to the defendant all her lands in said trust deed described, providing she might be allowed to redeem two lots included therein upon terms named, was agreed to by it, this court holds that said complainant is entitled to the benefit of such agreement, and that, upon the ascertainment of the amount due and the payment thereof within a time named, a conveyance to her of the premises in question must be made.

[Opinion filed October 28, 1889.]

38	607
43	499
43	608
33	607
51	68
33	607
97	108

IN ERROR to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

MESSRS. W. S. HARBERT and GEORGE R. DALEY, for plaintiff in error.

The doctrine in this State is, that when a party induces another to execute a conveyance to him by promising to convey to a third person, he will be considered as holding the title in trust for such third person; and we fail to see any distinction between such promise, and one to reconvey to the grantor. *Lantry v. Lantry*, 51 Ill. 458; *Fischbeck v. Gross*, 112 Ill. 208.

Where one of the contracting parties has been induced or allowed to alter his position on the faith of an oral contract, within the statute of frauds, to such an extent that it would be a fraud on the part of the other party to set up its invalidity, equity will make the case an exception to the statute. *Reed on the Statute of Frauds*, Sec. 553.

A conveyance by a husband and wife, passing her dower and homestead rights, is sufficient part performance of a verbal contract, that if she would so join in the deed, the vendor would convey other land to her. *Farwell v. Johnston*, 34 Mich. 343.

In *Morrell v. Cooper*, 65 Barb. 512, the parties, after a sale to the mortgagee under a decree of foreclosure, entered into a parol agreement by which the mortgagee was to reconvey to the mortgagor upon payment of the indebtedness. Upon the faith of this promise the mortgagor acquiesced in the sale, and omitted to apply by motion to have it set aside. *Held*, that to permit a party to avoid his agreement under such circumstances would be allowing the statute of frauds to be used as an instrument of fraud, instead of a shield against it.

The case of *Beegle v. Wentz*, 55 Pa. St. Rep. 369, is one which we deem to be conclusive on this point. In that case Beegle recovered judgment against Wentz, and levied upon certain land belonging to the judgment debtor and upon which he resided. Wentz claimed his exemptions under the statute. Upon this a parol agreement was entered into between the

parties, by which it was agreed that the land should be sold by the sheriff and bid in by the creditor; and that upon consideration of the debtor waiving his exemptions, Beegle would reconvey to him a part of the premises. Beegle, upon obtaining title to the premises, refused to reconvey and brought ejectment. The defendant set up the parol contract, and the court held that the case was not within the statute of frauds. They say: "The distinguishing feature of the case is that the agreement of Wentz was not to acquire a new interest in the land by parol; but he was the owner of the land; had a title, both legal and equitable, and a right to retain so much of the land as would be of the value of \$300. It was this subsisting title which Beegle procured Wentz to forego by his promise to leave him his house and fifteen acres, and make over to him the sheriff's deed for that part. This part he was not to take, but to hold in trust. His language was that he did not want to take their home from them; that he would give them a home of fifteen acres, provided Wentz would sign some agreement to let him sell the whole tract; and he would buy the land and give them a sheriff's deed for the fifteen acres. * * * The trust in such cases arises *ex maleficio* on the principle that equity will not permit one to deprive another of the title which he actually has, by such a promise, not intended to be performed. * * * Nor does it make any difference that the title was acquired by Beegle through a judicial sale. When the trust arises in a fraud, it vitiates all deeds, private or judicial." That case is cited approvingly by this court in *Fischbeck v. Gross, supra*.

Messrs. SWETT, GROSSCUP & WEAN, for defendant in error.

The alleged agreement, taken as stated, does not, in connection with all the facts of the transaction, confer upon the appellant a right to redeem.

In this State 'a mortgage or trust deed passes to the mortgagee the legal title in the premises as security for the debt, reserving to the mortgagor the right to defeat such legal title by the payment of the debt. Bispham's Eq., Sec. 151; Carroll

v. Ballance, 26 Ill. 9; Jackson v. Warren, 32 Ill. 331; Harper v. Eli, 70 Ill. 581.

The equity of redemption is the right which the mortgagor has in the land, upon his payment of the debt for which the mortgagor stood as security. Such right is not fastened upon land by any contract subsequent to the making of the mortgage, but is an estate, inhering in the mortgagor at the time of the making of the mortgage, and not defeated thereby. An equity of redemption, or the right to redeem, therefore, while it may be affected by some subsequent contracts, as for instance a contract extending the time within which it shall be exercised, is not created by contract. The fact that the appellant may have supposed herself acquiring, by her alleged agreement, the right to redeem, does not give her any such right. She could not, any more than a stranger, acquire the right to redeem by a contract with the appellee. The appellant's right to redemption, then and now, if any exists, arises from her estate in the land, and is subject to the conditions which the law uniformly imposes upon the exercise of that right, viz.: that the redemption extend to the whole tract by the payment of the whole debt. There can be no division of the tract, part of which shall be redeemed and part not redeemed, or division of the debt, part of which shall be paid, and part remain unpaid, and the payment must be in money. Jones on Mortgages, Secs. 1070, 1072.

These principles would be too familiar for repetition, but for the argument of counsel that the appellant is entitled to "redeem" a portion only of the mortgaged premises, upon the promise to pay a portion only of the debt. The argument amounts to the proposition that the conditions of redemption, fixed by law, may be changed by the parol contracts of the parties. It would follow that upon proof of a parol agreement to that effect, the mortgagor could redeem by the payment of an infinitesimal portion of the mortgage debt.

GARY, P. J. The facts of this case as established by a preponderance of the evidence, are that in May, 1871, the insurance company loaned \$60,000 to the complainant and plaintiff

Kirchoff v. Union Mutual Life Ins. Co.

in error and her husband, Julius Kirchoff, and her mother, Angela Diversy, upon their note secured by a trust deed conveying many parcels of land belonging to them in severalty, among which were lots 2 and 4 in block 21 of the Canal Trustees' subdivision of the south fractional quarter, Sec. 3, T. 39 N., R. 14, E. 3d P. M., which were the property of the complainant.

In 1878 there was default in payment. Reasons which are not very clearly shown by the record, led to negotiations which resulted in the conveyance by the mother of all her lands included in the deed, except forty acres which the company released to her, and by the complainant and her husband of all their lands included in the deed, which conveyances the company accepted in satisfaction of their debt. But as to a part of the transaction, it was agreed that the complainant might purchase from the company the two lots for \$10,000, the terms for the payment of which are involved in considerable uncertainty, except that they were to extend over a period, probably of nine years, but which certainly has now elapsed, and the rate of interest was to be six per cent.

She filed her bill to have the benefit of this agreement. The bill was dismissed upon the hearing. As was said in *Sargent v. Howe*, 21 Ill. 148, the deed of trust in this case "only differs from a mortgage with power of sale in its being executed to a third person instead of the creditor," and therefore the dealings between the parties are within the rule applicable to mortgagors and mortgagees, "that the courts look upon their transactions with jealousy." 1 Jones Mtg., 711.

The evidence as to the agreement is by the testimony of Julius Kirchoff, E. A. Warfield, then general agent, and R. B. Kendall, then attorney of the company, and it was made between Julius Kirchoff, acting for the complainant, and Warfield, with some participation by Kendall, acting for the company.

The authority of Warfield to act for the company under circumstances as shown by this record, has been affirmed by the Supreme Court in the cases of this company v. White, 106 Ill. 67, and v. Slee, 110 Ill. 35. The testimony of Julius

Kirchoff, in regard to the agreement, is much weakened by the inconsistency of his conduct afterward, but it is so corroborated by Warfield and Kendall, that there is sufficient proof of the agreement. Before the conveyance to the company, it had commenced foreclosure proceedings, in which they sought to reform the description of part of the lands of Mrs. Diversy; she had answered, contesting it, and alleging a defense which, if successful, would have invalidated most, if not all, of the papers she had executed. The company understood, whether correctly or not is immaterial, that they could make no adjustment with her without the assent of the Kirchoffs. There were, therefore, considerations to induce the company to make the agreement, and that they did make it, is satisfactorily proved, and they have had from it all the benefit they proposed to obtain by it. The foreclosure proceedings went on after the conveyances, to cut off an intervening title, but with the agreement that it should not affect the agreement as to the lots described.

The company obtained deeds under the foreclosure in January, 1882, but refused to perform the agreement made by Warfield. As to the effect of this agreement, the rule in equity "once a mortgage, always a mortgage," applies.

As was said in *Ennor v. Thompson*, 46 Ill. 214: "When the mortgagor has conveyed the mortgaged premises to the mortgagee, it only operates as a bar to the equity of redemption, when it clearly and unequivocally appears that both parties so understood and intended it should." Here the contrary, as to the two lots, clearly and unequivocally appears. And it does not affect the complainant's right to redeem those lots, that as to the residue of the mortgaged property, there is no redemption, and that she proposes to pay but a small part of the original debt. When, by the operation of law upon the facts, or by the agreement of the parties, the debt has been apportioned, and a part of it made the sole burden upon a part of the incumbered property, that part may be redeemed by paying that part of the debt apportioned to the part redeemed. *Meacham v. Steele*, 93 Ill. 135; *Mutual Mill Ins. Co. v. Gordon*, 121 Ill. 366.

The complainant filed her bill to redeem in June, 1882. The lots she was to redeem and the principal sum she was to pay, as well as the rate of interest, are definitely fixed by the agreement.

The time at which the interest was to begin, and the amount and time of payment of the installments, are left uncertain. But this is not a bill for a specific performance. It is an appeal to a court of equity by the complainant that she may have her property restored to her upon the terms that she shall discharge the burden upon it, fixed in amount by agreement, and which, if that agreement had been executed and performed, would have been discharged in the time that has elapsed. She is now entitled to the benefit of that agreement, upon the terms that she, within a short time after the amount is ascertained, pay it. The decree is therefore reversed and the cause remanded to the Circuit Court with directions to that court to have an account taken of the amount due the company, crediting them with the principal sum of \$10,000 and interest thereon at six per cent from September 10, 1879, the day of the delivery of the deed of the complainant and her husband to the company, together with whatever the company has paid for taxes, assessments, insurance, repairs and other expenses upon the property so far as the same may be found to have been reasonably necessary, and charging them with the rents and profits which they have, or by ordinary care and diligence ought to have received from the property, interest to be allowed upon the disbursements if not repaid by the rents and profits (but there is to be no compounding of interest), and when the amount due the company is ascertained, to enter a decree that upon the payment of that amount with interest thereon within ninety days thereafter, the company convey to her, and that in that event she recover her costs. But if she do not so pay, the bill to be dismissed at her costs. *Bremer v. Canal & Dock Co.*, 127 Ill. 464.

Reversed and remanded with directions.

GARNETT, J., does not concur in the conclusion reached.

88	614
198	1 9

FRED W. WOLF COMPANY

v.

JAMES SALEM.

Master and Servant—Traveling Salesman—Wages—Expenses—Itemized Account of—Obligation to Keep—Account Stated—Usage—Evidence.

1. It is the duty of an employe receiving a salary and his expenses to keep and preserve true and correct statements of account.

2. The right to an itemized account of expenses may be waived by the principal, either by express agreement or by the acceptance of faulty statements in lieu thereof.

3. The rule that a traveling salesman shall preserve vouchers for expenditures in way of expenses must be construed in a reasonable manner.

4. When two parties by compromise liquidate and state at an agreed sum an unliquidated and disputed claim which the one holds against the other, it amounts to a valid contract whether the amount stated be paid or not, and the only remedy is upon the contract to recover the amount thus liquidated.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. HAMLINE & SCOTT, for appellant.

Messrs. TATHAM & WEBSTER, for appellee.

GARNETT, J. This was a suit in assumpsit by appellee to recover of appellant a balance on account, said to be due for services, commissions on sales and traveling expenses. In 1885 Fred W. Wolf was a manufacturer, at Chicago, of refrigerating and other machinery, and about June 1st of that year appellee entered his employ under a verbal agreement, by the terms of which, as sworn to by appellee himself, he was to receive \$100 per month salary, two and one-half per cent commission on sales, and his traveling expenses. In 1887 the Fred W. Wolf Company was organized, and suc-

Wolf Co. v. Salem.

ceeded to the business, having Mr. Wolf as its president and manager and retaining appellee in its service without any change as to his duties or compensation. On or before June 1, 1887, Salem's account of expenses was not entirely satisfactory to Wolf, and a small book was then handed to Salem for his expense account. Wolf testified that on July 1, 1887, he told Salem he would get no more money until he brought in a statement of his expenses. His employment continued until January 11, 1888, when he rendered to appellant a bill for salary, commissions and expenses, amounting to \$2,390.94. Some statements were rendered before that, but appellant insists that they were not such as appellee's duty required him to make. Of the amount claimed in the final statements, the sum of \$1,616.99 was for expenses. Wolf declined to pay the account, asserting that the expenses were excessive, that statements had not been rendered showing for what purposes expenses had been incurred, and that a large part of the expenses charged was not for traveling expenses, but was money spent at Chicago, where Salem lived. A statement of account was also prepared by Wolf, showing a balance of \$870.17 due Salem. Appellant claims that there was a settlement between the parties, and that full payment was made according to the terms of such settlement; but this is denied by appellee. The case was tried by the court without a jury; there was a finding and judgment for plaintiff for \$1,796.57 (the full amount claimed, less payments that had been made), and the defendant appeals.

The point most seriously disputed between the parties relates to the duty of Salem in keeping an account of his expenses, appellant contending that it should be at all times strictly itemized, while appellee claims that a statement of aggregates is allowable. For example, appellee admits in his testimony that he never rendered a statement of the items which constitute such charges as these: "Expenses in Chicago from July 1st, to July 12th, \$34"; "sundry expenses, \$125.12;" "money expended October 20th to December 30th, \$218"; "expenses in Chicago from July 18th to July 22d, \$12.50; difference as per my statement—short money difference, can not account for same, \$18.70."

On the trial the defendant requested of the court this proposition of law: "The court finds as a proposition of law, that under the contract shown by the evidence, the plaintiff was not constituted the sole judge of what were necessary and proper expenses of such employment, but that it was incumbent on the plaintiff, upon the trial, in order to recover such expenses, to show affirmatively, by a preponderance of evidence, that the amounts claimed were actually spent, that they were just and reasonable expenses, and for what purposes the amounts were spent, it not being sufficient that he swear to aggregate expenditures," which was refused.

The erroneous principle upon which this branch of the case was tried is evidenced from the position assumed by the judge in the course of the trial, when this passage occurred between the court and one of defendant's counsel:

"THE COURT: I think we can shorten that up. I think that when a man makes a contract with another man that he is to have his expenses paid, why, he leaves it to the man himself to make his expenses; and unless he can show that he has actually charged for money that he did not spend, I think he must stand it, and when he gets tired of him he can tell him to go, but he must pay his expenses, whatever they are.

"MR. SCOTT: Your Honor holds that he must present no evidence of what he spent, but that his expenses must be paid.

"THE COURT: And also, when he comes into court, he must swear to it. A man can not tell every day what he expended, he has got to take his word for it; especially when a man comes up here and swears that he did spend it. If it seems to be unreasonable, and if the employer is dissatisfied with the amount of the expenses, just let him discharge his man—that is a simple remedy—not come into court, ask the court to differentiate, and allow him fifty cents here and twenty-five cents there."

This method of determining upon what principle the court decided the case is not of recent origin in this State. *Ganche v. Mayer*, 27 Ill. 134; *Lowe v. Moss*, 12 Ill. 477.

It must be presumed that the opinion thus expressed by the judge continued to the time of the refusal of the above

proposition, as there is nothing in the record indicative of a change in his views. The law is settled and is sustained by reason, that the duty of an agent is not fulfilled in a case of this kind, by reporting to his principal that he has spent a round sound of money in prosecuting his employment, and then swearing to the fact in a suit to recover the sum. His duty to keep and preserve true and correct statements of account is a necessary consequence of his duty to account. Mechem on Agency, Sec. 528. An account is a detailed statement: 1 Bouvier's Law Dictionary, 53. It must be something which will furnish to the person having the right thereto, information of a character which will enable him to make some reasonable test of its accuracy and honesty, otherwise the obvious design of requiring it must be virtually fruitless. The right to an itemized account may be waived by the principal, either by express agreement or by the acceptance of a faulty statement in lieu thereof. No express agreement to that effect is proven, and whether the statements of aggregates were accepted as a compliance with Salem's duty, depends upon the facts—such as failure to object to the accounts rendered for any considerable time, and the absence of circumstances to repel the presumption of acceptance. The court below was of a different opinion, and refused a proposition of law in which this point was made.

The second proposition of law requested by appellant is abstractly sound, but there was no evidence in the case to warrant it. The fifth would seem to imply that Salem was bound to preserve vouchers for all his outlays in the shape of traveling expenses. The requirement of vouchers must be reasonable. It is a fact universally known that a receipt for railroad fare is never asked or given. Without laying down any arbitrary rule on the subject, we should say that some respect, in such matters, is due to the usages of business, where the parties have neglected to make specific provision in their contract. There was some evidence tending to prove an account stated between the parties before the suit was brought, and the seventh proposition asked by defendant on that point should have been given. When two parties, by

compromise, liquidate and state, at an agreed sum, an unliquidated and disputed claim which the one holds against the other, this constitutes a valid contract, whether the amount stated be paid or not, and the only remedy is upon the contract to recover the amount thus liquidated. *Hanley v. Noyes*, 35 Minn. 174.

We think no error was committed in refusing the remaining propositions asked by appellant. The law gives the right to a trial upon correct principles. In a case where the evidence is conflicting, it can not be known, until there is such a trial, whether justice has been done. The judgment is reversed and the cause remanded.

Reversed and remanded.

38	618
44	87

BEADLE COUNTY NATIONAL BANK

V.

SIGMUND HYMAN ET AL.

Guaranty—Letter of Credit—Construction of—Evidence—Surprise—Practice Act, Sec. 50.

1. This court holds that a letter bespeaking the assistance of a bank president in behalf of a third person, can not be construed as authorizing the purchase by said person of a bad debt from the bank in question, and guaranteeing payment therefor.

2. Whether a declaration states a case upon which a recovery can be had, is always an original question in a court of review, without regard to demurrers and motions in arrest below, if presented by the assignment of errors.

3. A court trying a cause without a jury, should act upon principles which it would direct a jury to follow in a similar case.

[Opinion filed December 2, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. ROLLIN S. WILLIAMSON, Judge, presiding.

Mr. JAMES K. EDSALL, for plaintiff in error.

Beadle Co. Nat. Bank v. Hyman.

When a business firm addresses a letter of this character to a bank, it is fair to presume that the "assistance" for which the bank may be called upon, and the "favor" which it may be expected to extend to the bearer of the letter, are such as fall within the scope of the business in which the bank is engaged, and embraces such assistance and such favors as the bank may, in the course of its business, properly extend. And this clearly embraced the loaning of money, the discount of commercial paper, and the giving or extension of credit on promissory notes.

The "assistance" contemplated in the letter was clearly not confined to the discount of a draft drawn by Moss on S. Hyman & Co., which was only one of the alternatives mentioned.

The undertaking of the writers of the letter is that "any favor" the bank might "be pleased to extend" to Moss "you may hold us responsible for."

The established rule of law is that while the terms of a written contract can not be enlarged or varied by parol, nevertheless, whenever there is any uncertainty in the meaning of its written terms, the contract should be read and construed in the light of the attending facts and circumstances, as they appeared to the parties when the contract was made. *Wilson v. Root*, 119 Ill. 379, 386; *Turpin v. Baltimore & Ohio R. R. Co.*, 105 Ill. 11, 19.

It is frequently necessary to apply this principle to aid in the construction of letters of credit. *White's Bank v. Myles*, 73 N. Y. 335, 337, 341; *Gates v. McKey*, 13 N. Y. 232; *Bainbridge v. Wade*, 20 Law Jour. (pt. 2), p. 7; *Mauran v. Bullus*, 16 Peters, 528, 533-4.

Messrs. MOSES & PAM, for defendants in error.

GARNETT, J. The record in this case is very large and the briefs very elaborate, covering in argument a number of intricate questions, but we regard the case as turning upon a very simple point and shall therefore confine our attention to that. The action was assumpsit upon the following letter:

"CHICAGO, Nov. 20, 1884.

F. E. STEVENS, Esq., Pres't Beadle Co. Nat. B'k, Huron,
D. T.

Dear Sir:—The bearer, Mr. M. F. Moss, may have occasion to call upon you for assistance during his stay at Huron. Any favor you may be pleased to extend to him you may hold us responsible for, or should he wish to draw upon us for money, we will honor his draft upon presentation.

Yours very respectfully,

S. HYMAN & Co."

At the time the letter was written the bank and S. Hyman & Co. were severally creditors of the firm of L. Adler & Co. of Huron, Dakota, which was then insolvent. There is a dispute whether Moss went to Huron as the representative of Hyman & Co. in the matter of their claim, and as to the time of the presentation of their letter, and what was said on that occasion, but it is not denied that the bank sold to Moss its claim against L. Adler & Co., and as payment therefor received his promissory note dated November 28, 1884, for \$2,731.48, payable December 11, 1884, with interest at twelve per cent per annum after maturity. On the back of the note was this indorsement: "If an extension of thirty days is desired it may be had." It appears from the evidence that an extension of thirty days was given for the payment of the note.

The plaintiff claims to have had possession of the letter sued on at the time of the execution of the note, but defendants deny it. But plaintiff says, even if the evidence fails to show its possession of the letter when the note was executed, it certainly had possession thereof when the extension was granted, and so the defendants are liable as guarantors. We think it makes no difference when the letter was handed to the bank. It does not contemplate such a transaction as the selling of a bad debt by the bank to Moss. There was nothing in the relations between the plaintiff and defendant in the terms of the letter, or in the surrounding facts, which authorized such a conclusion.

We have examined the record carefully to ascertain whether

Beadle Co. Nat. Bank v. Hyman.

there was anything in the evidence to warrant the construction given to the letter by the bank, and we are clearly of opinion there is nothing of the kind.

The judgment is affirmed.

Affirmed.

Upon Petition for Rehearing.

[Opinion filed January 8, 1890.]

GARY, P. J. On the trial the deposition of Stevens, the cashier of the plaintiff, was read in evidence. He testified that the letter of credit was delivered to him by Moss as security for the note Moss made to the bank. Moss and another witness testified that the letter of credit was not delivered until three days afterward, and then only as security for a wholly independent accommodation. On this state of the evidence the finding of the court, without a jury, in favor of the defendant, could not be disturbed, nor, if the testimony of the witnesses for the defendant is true, could the letter of credit be held by the bank as security for the note upon the ground that while it was in the possession of the bank an extension of the time of payment of the note was agreed upon, nor can the bank claim a new trial on the ground of surprise. It may not speculate upon the chance of a finding in its favor on the evidence as it stood, and, when disappointed, ask an opportunity to supply the further evidence it knew it needed on the first trial, and which it did not then ask the court to give, as the court might well have done—time to procure. A rehearing of the case would be useless to the appellants.

This court preferred, in its former opinion, to put the case upon a point which might possibly make the opinion of some future use upon the construction of a written instrument.

Whether a declaration states a case upon which a recovery can be had or not is always an original question in a court of review, without regard to demurrers and motions in arrest below, if presented by the assignment of errors. *Stearns v. Cope*, 109 Ill. 340; *Teal v. Walker*, 111 U. S. 242.

In *Chicago v. Turner*, 80 Ill. 419, it is within the personal knowledge of one member of this court, though the report does not show the fact, that a demurrer to the declaration had been overruled, and yet because it showed no cause of action the court erred in giving and refusing instructions. The statute makes the sufficiency of any court in a declaration a question that may be raised on the trial. Practice Act, Sec. 50; *Frink v. Schroyer*, 18 Ill. 416. It hardly needs to be stated that a court trying a cause without a jury should act upon principles which it would direct a jury to follow.

Rehearing denied.

GEORGE PARRY

v.

J. M. ARNOLD.

Contract—Storage—Presentation of Bill—Long Delay in—Practice—Rule 21.

1. In the absence from appellant's abstract of any exception taken to rulings of the trial court and the instructions given or refused in a case stated, this court will not look into the record to supply the omissions.

2. In an action brought to recover an amount claimed to be due for the storage of a machine, this court holds, the contention of the defendant being that the rate of charges was inserted in the application for storage after he signed the same, that a bill sent to him covering such claim and the letter written by him in reply thereto were admissible in evidence in his behalf, and declines to interfere with the judgment in his favor.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. G. FRANK WHITE, for appellant.

Messrs. FLOWER, SMITH & MUSGRAVE, for appellee.

GARY, P. J. Where the abstract prepared by the appellant does not show an exception, the court will not look into

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Parry v. Arnold.

the record to see if one was taken, and where the abstract does not contain the instructions the record will not be referred to to supply the omission. Rule 21 is, in fact as well as form, a rule.

This is an action for storage on a machine left by the appellee with the appellant, on which the appellant advanced to the appellee \$25, and the question before the jury was whether that money was a loan to be repaid by the appellee, together with storage charges, or whether the appellant took the machine to do what he pleased with it, so far as the appellee was concerned, and with no recourse upon the appellee for money advanced or storage charges.

The appellant produced an application from the appellee to the appellant, upon a printed blank, beginning, "store for me in your warehouse," some portion of the printed part of which was erased, but which contained no promise in express words to pay anything. The appellee testified that the rate of storage was inserted after he signed it, as the result of a conversation, that as he was to pay no storage, it made no difference what rate was inserted. The transaction was in April, 1885. About the end of January, 1887, the appellant sent to the appellee a bill, which the appellee returned in a letter. That bill and the letter were put in evidence by the appellee. To the foregoing evidence of appellee the appellant presented exceptions. It was all admissible. It was for the jury to say whether the rate of storage was inserted after signature, and if so, whether as a part of a contract between the parties or for some other purpose; and it being disputed that the rate was inserted after signature, the long delay of the appellant in making any claim was a circumstance which the appellee had the right to present for the consideration of the jury in corroboration of his testimony; and then it followed that he had the right to show that when a claim was made he did not acquiesce, and thereby impliedly admit the justness of the claim. There is no error of law, and the verdict of the jury settles the facts. Judgment affirmed.

Affirmed.

FREDERICK J. LANGE ET AL.

V.

HENRY SOFFELL.

Highways—Taxes—Illegal Levy—Refunding of—Suit to Recover—Parties.

1. Highway commissioners are a *quasi* corporation, and suit by or against them should be brought in their official and not their individual names.

2. A payment of money is not to be regarded as compulsory unless made to relieve the person or property in question from the actual and existing duress imposed by the party to whom the money is paid.

3. In an action brought to recover in full an amount paid under an illegal levy of taxes for the purpose of establishing a road, the fact being that subsequent to the declaration of illegality by the Supreme Court a resolution was adopted at a regular town meeting to refund said levy less a percentage for expenses, this court holds that the plaintiff is entitled to the refunding of the same only under said resolution and in conformity with the terms thereof.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. VALLETTE & GRIFFIN, for appellants.

Messrs. E. H. & N. E. GARY, for appellee.

MORAN, J. This action was commenced before a justice of the peace to recover back \$19.45, paid by appellee in discharge of a tax upon his land levied by the town of Proviso, for the building of a hard road. The Supreme Court held the levy illegal, and at the annual town meeting thereafter, a resolution was passed directing the commissioners of highways and their treasurer, to refund to the persons who paid the tax, *pro rata*, according to the several sums paid by them, on said persons producing satisfactory evidence of their payment of

said tax, so much of the fund collected for the improvement as remained in the hands of the treasurer of the commissioners of highways, after deducting the cost expended in levying and collecting said tax, and the expenses of litigation therefrom. This left about eighty per cent of the tax paid to be refunded to the taxpayers, and the commissioners of highways offered to refund to appellee eighty per cent of the tax paid by him, but he refused to receive it and brought this action. The suit before the justice was against the highway commissioners individually, but when it came up for trial in the Superior Court, an amendment was made making the board of highway commissioners also defendants, and upon the trial, which was by the court, the jury being waived, there was a finding and judgment against all the defendants, and an execution was awarded against all. This was error. There was no proof whatever, introduced, which showed any claim by appellee against the individuals who were highway commissioners.

If appellee had any action at all it was against the highway commissioners of the town. Highway commissioners are a *quasi* corporation, and suit by or against them should be brought in their official and not in their individual names: *Town of Rutland v. Town of Dayton*, 60 Ill. 58. No execution should have been awarded against the highway commissioners, they being a municipal corporation. *Village of Kansas v. Juntgen*, 84 Ill. 360, and cases there cited.

But aside from these technical grounds we are of opinion that appellee was not entitled to recover on the proof made. The levy is admitted to have been void. Appellee paid the tax levied on his land voluntarily. He was under no compulsion or duress. A sale of his land on a judgment rendered on a void levy would have passed no title. The payment of the land tax, \$18.71, was made to the county collector, and so far as appears he had no warrant authorizing a levy on personal property for said tax. It is invariably held that a payment is not to be regarded as compulsory unless made to relieve the person or property from the actual and existing duress imposed upon him by the party to whom the money is

paid. *Elston v. Chicago*, 40 Ill. 514; *Swanston v. Ijama*, 63 Ill. 165. Appellee's only right to recover this land tax is based on the resolution passed at the town meeting, and under such resolution he is undoubtedly entitled to his *pro rata*, and upon complying with the terms of said resolution, if the highway commissioners refuse to pay him he may maintain his action. The judgment must be reversed and the case remanded.

Reversed and remanded.

DWELLING HOUSE INSURANCE COMPANY

v.

JOHN A. BUTTERLY, JR.

Fire Insurance—Oral Application—Policy—Conditions—Ownership—Mortgage.

1. A construction of a contract that nullifies and destroys the same, should not be adopted if it can be avoided.

2. In an action brought to recover upon an insurance policy, the company contending that it was not liable because of the breach of one of its conditions touching the title to the property covered, this court holds, that a policy upon farm stock and implements, covers the property on hand at the place mentioned when a fire occurs, even though no one of the identical articles destroyed were there when the policy issued, and that the sale or incumbrance of any such property covered, avoids the policy only as to the specific articles themselves.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. W. S. HARBERT and GEORGE R. DALEY, for appellant.

Mr. CHAS. L. EASTON, for appellee.

GARY, P. J. This was an action upon a policy of insurance, issued upon an oral application, and containing the following provision: " * * * If the interest of the assured in said prop-

erty or any part thereof now is or shall become any other or less than a perfect, legal and equitable title and ownership, free from all liens whatever, except as stated in writing thereon * * * this policy shall be absolutely void." The insurance was \$500 on farming implements, wagons, carriages, sleighs and harness; \$2,500 on horses, mules, oxen, colts, cows, heifers, calves, sheep and hogs; \$250 on frame addition to barn, fence and improvements, and \$250 on hay and grain in barn and in stacks on a farm mentioned. When the policy issued, portions of the property were mortgaged, and after it was issued other portions were, and nothing in regard thereto was written upon the policy. By the fire, property incumbered and property not incumbered, covered by the policy, was destroyed. The case was tried by the court without a jury; no propositions of law were presented under the statute and neither in the motion for a new trial or the assignment of error here, is there any complaint as to the amount of the damages assessed. *Horan v. People*, 10 Ill. App. 21.

Indeed, the abstract presents no data upon that subject, and the appellant's original brief says, "the only question is whether, under this condition of the policy, the chattel mortgages rendered it void." The inquiry now will be confined to that question. Although this policy was not upon a stock of merchandise, yet as to the property to which it attached, it is within the reason, and governed by the principle, of decisions relating to insurance upon such stock; that is, it covers the stock on hand, at the place mentioned, at the time of the loss, even though none of the identical articles destroyed were there when the policy issued. *American Ins. Co. v. Rothchild*, 82 Ill. 166; *City Fire Ins. Co. v. Mark*, 45 Ill. 482. The policy was for a term of three years, and it could not have been expected by either party, that the same farming implements, live stock, hay and grain, and no other, would be and remain upon a farm for that term. And this is a very important feature in determining whether a mortgage upon a portion of the property avoided the whole policy, or only so much of it as attached to the property mortgaged. A prior part of the same provision quoted from at the beginning of

this opinion is, "if the property or any part thereof shall be sold, conveyed, incumbered by mortgage or otherwise." Now if a literal reading of this provision is to be enforced, the assured could not sell a calf, sheep or hog, or a bushel of grain without rendering his policy void. A distinction might be attempted on the ground that if he sold articles from his farm, they would be taken away and the removal of them from the farm would take them out of the policy, as in *Towne v. Fire Ass.*, 27 Ill App. 433. But this would not remove the difficulty. The words of the provision remain. And suppose he sold a horse and then boarded him for the purchaser. If such an event had been presented to the contemplation of the parties when the policy issued, would either of them have thought that the policy was to be avoided by it? A construction that nullifies and destroys the contract is not to be adopted if it can be avoided. A reference to elementary works at large is sufficient authority for such a proposition as that. Then, as to sales of the movable insured property, it must be conceded that the parties did not intend that the policy should be affected, except as to the property sold. But by the words of the policy the same consequence is attached to a sale as to an incumbrance, and as it is manifest that in relation to sales, the consequence was to be as partial as the sales, why is it not as to an incumbrance? No case where such a provision containing, as this does, the words "or any part thereof," has been construed, has been found. Without these words, *Com. Ins. Co. v. Spankneble*, 52 Ill. 53, is authority that a sale of part, does not affect the insurance as to the residue of the insured property, and in *Dacey v. Agricultural Ins. Co.*, 21 Hun, 83, and *Merrill v. same company*, 73 N. Y. 452, the same rule is applied to incumbrances. The reasonable and fair conclusion is that a sale or incumbrance avoided the policy as to the thing sold or incumbered, and no further. The finding and judgment are as to this question, right, and the judgment is affirmed.

Judgment affirmed.

Willetts v. Wheeler.

HENRY WILLETTS
V.
OSCAR G. WHEELER ET AL.

Negotiable Instruments—Notes—Interest—Usury—Remittitur—Costs.

In an action brought to recover upon certain promissory notes, the plaintiffs offering to remit all over and above a sum named, if it was held that the defense of usury was made out, this court holds that the plaintiff is entitled to a judgment for the sum named.

[Opinion filed December 2, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. P. L. SHERMAN and W. B. BRADFORD, for plaintiff in error.

Messrs. PAYNE & PORTER, for defendants in error.

GARY, P. J. From the record no very satisfactory history of the dealings out of which the suit grows, can be extracted, upon the truth of which reliance can be placed. It is clear, however, that in 1875 the appellant had, as a loan from the appellees, \$3,614.74 more than he has ever repaid; that the notes sued upon in this case are now the only evidence remaining of the indebtedness created by that loan; that the loan was at a usual rate of interest. The appellees offer to remit all beyond the sum above named, if the court comes to the conclusion the defense of usury is made out; and acting upon that offer, the judgment of the Superior Court is reversed and the cause is remanded with directions to permit the appellees to enter judgment and issue execution for the sum above named. Appellees pay the cost here.

Reversed and remanded with directions.

THE WINONA PAPER COMPANY

V.

FIRST NATIONAL BANK OF KALAMAZOO.

*Insolvency—Assignment—Publication of Notice—Filing of Claim—
Note—Appeal—Failure to Present Bond for Approval in Apt Time—
Stipulation—Bill of Exceptions.*

1. In view of the filing of briefs by the appellee wherein are discussed the merits of a given cause, a motion filed by him on the same day asking that the appeal be dismissed because the appeal bond was not presented for approval until after the time fixed therefor in the order allowing the same, must be considered waived.

2. Upon petition of the indorsee of a note given by a corporation subsequently insolvent, that it might be permitted to share in the distribution of the estate although its claim was not filed in apt time, this court holds that in view of the fact that the trial under review, was under a stipulation that the assignee duly published a notice as required by law, the argument of petitioner that said notice was defective can not stand, and that the trial court erred in granting the relief as prayed.

[Opinion filed December 2, 1889.]

APPEAL from the County Court of Cook County; the Hon.
RICHARD PRENDERGAST, Judge, presiding.

Messrs. FLOWER, SMITH & MUSGRAVE, for appellant.

Messrs. OSBORNE BROS. & BURGETT, for appellee.

GARNETT, J. On July 15, 1887, the W. O. Tyler Paper Co. executed and delivered its promissory note for \$1,461.27, payable to B. F. Lyon & Co. in three months after date, which was assigned by the payees and delivered to the appellee on or before August 1, 1887, and the same has been ever since owned and held by appellee. By deed of assignment executed pursuant to Chap. 10, R. S., the W. O. Tyler Paper Co. conveyed all its assets to James L. Rubel, as assignee, for benefit of its creditors. Immediately after his appointment,

Winona Paper Co. v. First Nat. Bank.

the assignee sent to B. F. Lyon & Co. the notice required by the statute, requesting them to file their claim with him on or before November 13, 1887; but no notice was sent to appellee, the reason being, presumably, because the assignee had no notice of the assignment of the note to appellee. From a stipulation in the cause it appears that the assignee "duly published a similar notice as required by law." The claim of appellee was not presented to the assignee; but on February 20, 1888, petition was filed by appellee in the County Court, praying that its claim should be allowed as a debt against the estate of the insolvent, and that it might be permitted to share in the distribution of the estate as fully as though the claim had been filed in apt time. The Winona Paper Co., a creditor of the insolvent, having filed its claim, objected to the granting of the petition of the bank; but on July 1, 1889, its objection was overruled, and a decree entered according to the prayer of the petition. To that decree the Winona Paper Co. excepted, and brings this appeal to reverse the decree.

Appellee asks that the appeal be dismissed because the appeal bond was not presented to the County Court for approval until after the time fixed therefor in the order allowing the appeal. A paper purporting to be a motion to that effect was filed in this court on October 17th of this term, but no entry of the motion was ever made on the record. On the same day the briefs of appellee were filed in the cause in which the merits of the case are discussed at large. Under these circumstances the supposed motion, which merely goes to the manner in which the case comes to this court, must be regarded as waived by appellee. *Martin v. Hochstadter*, 27 Ill. App. 166.

At the time the decree was entered this appeal was prayed, and twenty days given by order of court for filing bill of exceptions. The bill was signed by the judge on July 25th, after the lapse of the term and after the twenty days had expired. For that reason appellee prays that the bill of exceptions may be stricken from the record. We find, however, attached to the bill of exceptions, a stipulation signed by

counsel for appellee, in these words: "It is stipulated that the foregoing bill of exceptions may be incorporated in and taken to the Appellate Court as a part of the record herein, as provided by the statute." Good faith requires the application here of the doctrine of estoppel against appellee. If necessary to give effect to this stipulation, it would be presumed that all necessary orders were entered by the County Court to make the bill of exceptions a part of the record. The terms of the stipulation would seem to import as much.

As an excuse for not presenting its claim within the three months allowed by the statute, the appellee says the notice published was dated August 9th, while the date of the first paper in which it was published was August 13th; that a creditor, seeing the publication for the first time on November 10th succeeding, would conclude that he was too late, as that would be one day after the expiration of the three months from August 9th. There seems to be some plausibility in this point, and it appears to be supported by *Metropolitan Bank v. Morehead*, 38 N. J. Law, 500. But the force of the argument is broken by the fact that the trial, which is under review on this appeal, was under a stipulation that the assignee "duly published a similar notice as required by law." To be sure a notice dated August 9th, and a certificate of publication thereof, stating that the same was first published August 13th, were introduced in evidence, but they do not contradict the stipulated fact that a notice was duly published, as required by law; another notice might have been published in a different paper.

In *Suppiger v. Seybt*, 23 Ill. App. 468, it was held, that if a claim was not presented within the three months given by the statute, it could not participate in the distribution with claims presented within that time, and allowed by the court. With that we agree, and as the decree of the County Court is to the contrary, it is reversed and the cause remanded for further proceedings.

Reversed and remanded.

CHARLES SUNDBERG

V.

ADA F. TEMPLE.

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Negotiable Instruments—Note—Judgment by Confession—Motion to Set Aside—Affidavits.

This court holds as proper the order of the trial court overruling a motion to set aside a judgment entered by confession in favor of the plaintiff and against the defendant, the case as based upon the affidavits of both parties being free from doubt, no attempt having been made by the defendant to deny or controvert the statements set forth in that of the plaintiff.

[Opinion filed December 2, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. GEORGE W. PLUMMER, for plaintiff in error.

Mr. H. C. NOYES, for defendant in error.

Per Curiam. This record brings here for review the order of the trial court overruling a motion to set aside a judgment entered by confession in favor of defendant in error and against plaintiff in error. Plaintiff in error stated in his affidavit, filed in support of the motion, that the note in question was given to one M. S. Robinson, the payee in the note, who was affiant's partner, as an accommodation note, for the purpose of his, said Robinson's, procuring a temporary loan of money for his own use; that Robinson had the possession of said note until long after the same became due. That at the time the note was given plaintiff in error was not indebted to said Robinson in any sum, and that there was no consideration for said note. Defendant in error filed her counter affidavit, in which she states that the note was given for money loaned by her to Sundberg; that she had loaned him \$3,000; that he had paid her various sums on said loan, by which the amount owing was reduced to \$1,950, the amount of the note;

that a few days before the note was given, Sundberg had paid her on said loan the sum of \$325, and that when the note was given to her she surrendered to Sundberg other notes, which were given to her for money loaned, and that the note in question was given in settlement of all moneys due from Sundberg. That the note was delivered to her on the day it was executed, and had remained in her possession until September 23, 1889, when she delivered it to Robinson for collection, and Robinson gave her a receipt for the same, which she attaches to her affidavit. Afterward Robinson returned the note to her, saying that he could not collect it. The note in question is dated May 20, 1885, is due one year after date, and bears eight per cent interest, and such is the description of the note given in the receipt of Robinson, which was introduced in evidence.

Plaintiff in error did not attempt to contradict the facts as detailed in the affidavit of defendant in error.

We are of opinion that the court properly refused to set aside the judgment, or allow an issue to be formed, to be tried by a jury.

The case as it stood on these affidavits can not be said to have been involved in doubt. Plaintiff in error had the opportunity to deny or controvert the statements made in the affidavit of defendant in error; having failed to do so, those statements were to be taken as true. The judgment must be affirmed.

Judgment affirmed.

FERDINAND SIEGEL ET AL.

V.

SETH F. HANCHETT, FOR USE, ETC.

Replevin—Debt—Bond—Damages — Attorney's Fees — Evidence — Instructions.

1. Solicitor's fees are within the condition in a replevin bond, providing for the payment of all costs and damages occasioned by wrongfully suing out the writ.

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Siegel v. Hanchett.

2. The attendance of an attorney and his conduct of the trial raises the presumption of a retainer and liability to pay usual fees, and damages may be given for a liability to pay as well as for actual payment.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. ARBA N. WATERMAN, Judge, presiding.

Messrs. FLOWER, SMITH & MUSGRAVE, for appellants.

The case of *Janes v. The People*, 19 Ill. App. 300, was an action on a sheriff's bond. The plaintiff was permitted to prove, and the jury were instructed that they should allow to the plaintiff as damages the expenses incurred by her in the trial of the right of property, including attorney's fees, traveling and hotel expenses, and all costs, including the expense of printing briefs, etc., in the Appellate Court. The Appellate Court, by Wall, P. J., says: "In an action on a contract the successful party recovers only such costs as are taxable under the statute; he can not usually have an allowance for his loss of time and expense in prosecuting the demands or making the defense, as the case may be, and the expenses for services of attorneys stand upon the same ground as the other personal expenses of the party, not embraced in the list of taxable costs.

"Legal relief is at best imperfect; it is not usually designed to furnish complete and perfect indemnity, and it may well be doubted whether a sound public policy would be subserved if absolute indemnity were given, since thereby a great and even a dangerous stimulant would be furnished to litigation.

"A defendant should have the same hope of indemnity in this respect as the plaintiff. In certain exceptional cases the law provides for such indemnity by requiring bond and security, but we think it may be stated as a general rule that such items are not ordinarily allowable, even in actions in form *ex delicto*, unless there is an admixture of fraud, malice, or other such sinister motive as will furnish ground for vindictive or punitive damages.

"In the present instance the owner of the property might have replevied, and in that proceeding could have recovered damages for the detention of the goods, or she might have brought trover or trespass against the sheriff, but in neither of these actions could she have been allowed for counsel fees or personal expenses, without showing such a case as would warrant vindictive damages. The law will not sustain her in accomplishing such a result in the indirect way here attempted."

In the case of *Pacific Insurance Co. v. Conrad*, 1 Baldwin (C. C.), 138, the court used the following language:

"The rule which ought to govern juries in assessing damages for injuries to personal property depends much on the circumstances of the case. When a trespass is committed in a wanton, rude and aggravated manner, indicating malice, or a desire to injure, a jury ought to be liberal in compensating the party injured in all he has lost in property, in expenses for the assertion of his rights, in feeling or reputation; and even this may be exceeded by setting a public example to prevent a repetition of the act. In such cases there is no certain fixed standard; for a jury may properly take into view, not only what is due to the party complaining, but to the public, by inflicting what are called in law speculative, exemplary or vindictive damages. But when an individual, acting in pursuance of what he conceives a just claim to property, proceeds by legal process to enforce it, and causes a levy to be made on what is claimed by another, without abusing or perverting its true object, there is and ought to be a very different rule, if, after a due course of legal investigation, his case is not well founded. This is what must necessarily happen in all judicial proceedings, fairly and properly conducted, which are instituted to try contested rights to property. The value of the property taken, with interest from the time of the taking down to the time of the trial, is generally considered as the extent of the damages sustained, and this is deemed legal compensation, which refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner by the trespass. These are taken into

Siegel v. Hanchett.

consideration only in a case more or less aggravated. But where the party, taking the property of another by legal process, acts in the fair pursuit of his supposed legal right, the only reparation he is bound to make to the party who turns out ultimately to be injured, is to place him, as to the property, in the same situation in which he was before the trespass was committed. The costs of the action are the only penalty imposed by the law, which limits and regulates the items and amount. In the present case the defendant acted under the order of the Government in execution of his duties as a public officer; he made the levy, but committed no act beyond the strictest line of his duty, which placed him in a situation where he had no discretion. The result has been unfortunate for him; he has taken the property of the plaintiffs for the debt of Edward Thomson, and must make them compensation for the injury they have sustained thereby, but no further."

These cases, we think, indicate the proper rule, and are well supported by the authorities. See *Davis v. Crow*, 7 Blackf. 129; *Kenly v. Commonwealth*, 6 B. Mon. 568; *Blackwell v. Acton*, 38 Ind. 426; *Park v. McDaniels*, 27 Vermont, 594; 2 *Sutherland on Damages*, p. 50.

Mr. ALLAN C. STORY, for appellee.

GARY, P. J. This is an action of debt on a replevin bond. The question in it arises upon an instruction to the jury, that in assessing damages they should, *inter alia*, award "the usual and customary charges for attorney's fees, in trying and conducting said replevin suit." The replevin suit had been disposed of on the merits upon the second trial. The fees paid for the first trial were proved.

The "usual and customary" fees for the second trial were proved, but no proof was offered of any retainer of the attorney who conducted the defense on that trial, or that anything had been, or was agreed to be, paid to him for it. The condition of the bond contained the statutory clause to pay all costs and damages occasioned by wrongfully suing out the writ.

The appellant's object that the condition does not cover attorney's fees for services in defeating the replevin suit, and that without proof of payment, or agreement to pay the fees, they should not be allowed, even if covered by the condition. The first question is not an open one in this court. It was made in *Horner v. Boyden*, 27 Ill. App. 573, and considered by the court, but other questions fixed the attention of the writer of that opinion, to the extent that he inadvertently omitted to mention that point, which had even then been settled here, by the unreported case of *Burnstein v. Matson*, in 1883.

Under statutory language as to assessing damages on the dissolution of an injunction, similar in form, and in effect the same as the language of this condition, the cases in this State are numerous that solicitor's fees are allowable. *Ryan v. Anderson*, 25 Ill. 372 has, as to this point, never been departed from. *Misner v. Bullard*, 43 Ill. 470.

As to the other questions, the undisputed fact that the attorney attended and conducted a trial for three days, and afterward appeared and resisted the motion for a new trial, raises the presumption of a retainer and liability to pay usual fees, and that the fees allowed were usual was not contested.

Damages may be given for a liability to pay, as well as for actual payment. *Directors v. Trustees*, 66 Ill. 247; *Richardson v. Chasen*, 10 Ad. & El. N. S. 756.

There is no error and the judgment is affirmed.

Judgment affirmed.

33 638
77 656

CHARLES H. MAGUIRE

v.

JOHN L. WOODS ET AL.

Practice—Creditor's Bill—Demurrer.

An order sustaining a demurrer, not being a final decree, is not appealable.

[Opinion filed December 2, 1889.]

Johnson v. Wilson.

APPEAL from the Superior Court of Cook County; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. KEATOR & THOMPSON, for appellant.

Messrs. JONAS HUTCHINSON and BYRON BOYDEN, for appellee.

GARY, P. J. The appellant filed a creditor's bill under section 49 of the chancery act, making the village of Hyde Park one of the defendants, to reach the salary of Woods, as one of the village trustees. The village demurred, the court sustained the demurrer, and there the record of the action of the court upon the cause stops.

What this court would have to say upon the merits, if the case was properly here, may be plausibly conjectured by reading the case of Merwin v. Chicago, 45 Ill. 133; but the order sustaining the demurrer is not a final decree, and therefore not appealable. Knapp v. Marshall, 26 Ill. 63.

The appeal is dismissed.

Appeal dismissed.

JAMES D. JOHNSON AND GEORGE P. BLAIR

v.

CHARLES D. WILSON.

Landlord and Tenant—Recovery of Rent—Respectability of Neighborhood—False Representations—Court of Equity.

Fraud is a good defense at law to an action upon a sealed instrument, if the fraud is such as shows that the party has been tricked into signing an instrument that he did not intend to execute, but such defendant can not show in an action at law, that he was induced to sign by fraudulent representations as to collateral matters, or as to the nature and value of the consideration.

[Opinion filed December 2, 1889.]

33	639
64	425
33	639
33	546
67	89
33	639
69	118

33	639
110	180

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. WILBER & CLARK, and JOHN W. SMITH, for appellants.

Messrs. JAMES B. MUIR and ROBERT H. VICKERS, for appellee.

MORAN, J. This was an action to recover rent, brought on a lease under seal, executed by appellants. The defense was that appellants were induced to enter into the lease by false representations as to the respectability and purity of the neighborhood in which the dwelling leased was situated.

Much evidence was introduced pro and con on the matter of this defense, and the court, to whom the case was submitted for trial, found the issue of fact in favor of appellee. The judge might have saved much trouble had he applied a well settled principle, and excluded all evidence tending to show that the execution of the lease was induced by false and fraudulent representations. Fraud will be a good defense at law to an action upon a sealed instrument, if the fraud is such as shows that the party has been tricked into signing an instrument that he did not intend to execute, such as misreading the instrument, the surreptitious substitution of one paper written for another, or the like. But the defendant is not allowed to show, in an action at law on such an instrument, that he was induced to execute it by fraudulent representations as to collateral matters, or as to the nature and value of the consideration. *Jackson v. Hills*, 3 Cowen, 290; *Windett v. Hurlbut*, 115 Ill. 403; *Gage v. Lewis*, 68 Ill. 604; *Escherick v. Traver*, 65 Ill. 379; *George v. Tate*, 102 U. S. 564. Cases cited in notes to *Collins v. Blanturn*, 2 Smith's L. C. p. 689.

Taking all the evidence introduced by appellants as true, it did not make out a legal defense. If they wished to avoid the lease on the ground of false representations, they should have applied to a court of equity.

The judgment must be affirmed.

Judgment affirmed.

Coffman v. Clarinda Nat. Bank.

SAMUEL COFFMAN AND THOMAS H. BROWN

V.

CLARINDA NATIONAL BANK.

Banks—Drafts—Agreement by Commission Merchant to Pay upon Presentation—Cashing of by Local Bank—Recovery on.

In an action brought by a bank to recover on a draft upon commission merchants to its order, the amount called for having been paid by it to the drawers, this court holds that the agreement by the commission merchants to honor drafts upon stock about to be shipped, was legally binding upon them, being acted upon by said bank, and that the course of business between the parties previous to the making of the draft in question was such as to warrant plaintiff's claim, and declines to interfere with the judgment in its behalf.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the
Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. DUPEE, JUDAH & WILLARD, for appellants.

Messrs. PECKHAM & BROWN, for appellee.

MORAN, J. Appellants were in the livestock commission business, at the Union Stock Yards, in Chicago. Webb Brothers were a firm engaged in buying cattle and shipping them to market to sell, their field of operations being in Clarinda and other points in Iowa and Missouri, along the line of the H. & S. R. R.

On May 18, 1889, said Webb Brothers drew the following draft on appellants:

"\$5,000.

CLARINDA NATIONAL BANK,

CLARINDA, IOWA, 5-18, 1889.

Pay to the order of Clarinda National Bank five thousand
00-100 dollars.

WEBB BROTHERS.

To Coffman & Brown,
U. S. Yds., Chicago, Ill."

This draft was delivered on the day it was drawn to the Clarinda National Bank, and said bank cashed the checks of Webb Brothers to the amount of said draft, the money being used by said Webb Brothers to pay for four car loads of cattle and one car load of hogs, which they had purchased and were about to ship to appellants.

On the same day said Webb Brothers wrote appellants, saying: "We ship you four cars of cattle to-day, and will ship hogs to-morrow or Thursday. Have made drafts for \$5,000 this A. M."

The draft was sent on to Chicago for collection by the Clarinda Bank, and was presented to appellants the day before the cattle arrived, but, it is contended, was not accepted by them.

The hogs mentioned in Webb Brothers' letter were not shipped to appellants, it being found they would sell better at a point in Iowa.

After the cattle had been sold by appellants, the draft was again presented to them and they refused payment upon it, and credited the proceeds of the sale of the cattle upon an indebtedness due from Webb Brothers to them.

On the trial, which was by the court, a jury being waived, appellee introduced evidence tending to show that appellant Coffman, acting for his firm, promised Webb Brothers in the fall of 1885, to pay such drafts as they should make on appellants, to pay for stock that said Webb Brothers had in sight, and which could be shipped within a few days. That Webb Brothers communicated said agreement to the Clarinda National Bank, and that the parties entered upon a course of dealing under such arrangement, and that between October 21, 1885, and the date of the draft in question, appellants paid some fifty-four drafts drawn by Webb Brothers in favor of the Clarinda National Bank, amounting in the aggregate to \$76,000, for money advanced by the bank to Webb Brothers to pay for live stock purchased, to be shipped, and which was shipped, to appellants. It was further shown that the car load of hogs when purchased and when loaded was intended to be shipped to appellants, but that after the bank had

Block v. Blum.

advanced the money on the draft on the understanding that it was to be used to pay for the stock to be shipped to appellants, the hogs were sent to other consignees.

Appellant Coffman denied that he made any such agreement to pay drafts drawn by Webb Brothers, and the conflict of evidence thus arising was one which must be held to be conclusively settled in favor of appellee by the finding of the trial judge who saw the witnesses and heard them testify. The course of business during the winter and spring preceding the making of the draft in question, appears to give substantial support to appellee's claim, but even if this were not so, we could not interfere with the finding.

The draft sued on was, in our opinion, one of a character which the contract, if made, bound appellants to pay. That such agreement may be made, and is legally binding when acted upon by third persons, is well settled. *Nelson v. First National Bank*, 48 Ill. 36; *Boyce v. Edwards*, 4 Peters, 122.

The judgment of the Superior Court must be affirmed.

Judgment affirmed.

JOSEPH BLOCK ET AL.

V.

JOHN BLUM ET AL.

Appeals—Bond—Misstatements Therein as to Name—Form of Action—Change of in Higher Court—Justices.

1. A bond upon an appeal from a judgment in trover rendered in a justice court is not discharged for the reason that the form of action was changed to assumpsit in the higher court.

2. A mistake in an appeal bond as to the name of the party who recovered the judgment appealed from is fatal to an action thereon, for the reason that no record of the court appealed to, showing any disposition of a suit between the parties named in the bond can be produced, and therefore that no breach of the condition of the bond can be proved.

3. The true intent of such bond may be followed, where the same can be discovered therefrom, without the aid of extrinsic evidence.

33	643
43	379
44	194
33	643
51	487
33	613
57	314
57	334
33	643
74	100
33	643
80	49

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. HOFHEIMER, ZEISLER & ROSENBERG, for appellants.

Mr. M. D. BROWN, for appellees.

GARY, P. J. The appellants recovered a judgment in trover against Blum before a justice of the peace. He appealed to the Circuit Court, and gave a bond with the other appellee as surety, which recited that Emil Block was one of the persons who recovered the judgment. The person intended was Emil Pollock. In the Circuit Court the form of the action was changed to assumpsit and the appellants recovered.

The judge of the Superior Court trying this case as an action on the bond without a jury, found for the appellees; but whether upon the objection that the form of action was changed, or that the mistake in the name was fatal, does not appear. There is nothing in the first objection. It makes no difference what the justice, or the plaintiff before him, calls an action there. It is in the fact that the evidence fits. *Swingley v. Haynes*, 22 Ill. 214; *Chi. & R. I. v. Reid*, 24 Ill. 144. The point of the second objection is not that a bond running to an obligee by a wrong name can not be enforced, but that no record of the Circuit Court showing any disposition of a suit between the parties named in the bond, can be produced, and therefore no breach of the condition of the bond can be proved. "Parol evidence can neither bend the bond to the record nor the record to the bond." *Colman v. Crumpler*, 2 Dev. (N. C.) Law, 508. Where what ought to have been, as well as the mistake, appears upon the face of the bond, so that it may be helped out by construction, without extrinsic evidence, the true intent may be followed. *Schill v. Reisdorf*, 88 Ill. 411; *Hibbard v. McKindley*, 28 Ill. 240. The question has usually arisen on a motion to dismiss

Michaelis v. Wolf.

the appeal, and the variance of the bond from the record has always been held fatal, even when the practice did not permit the substitution of a new bond. *Gillilan v. Gray*, 13 Ill. 705; *Brooks v. Jacksonville*, 1 Scam. 568; *People v. Monroe* 3 Wend. 426.

The finding in favor of the appellees was therefore correct, and the judgment is affirmed.

Judgment affirmed.

FREDERICK W. MICHAELIS
v.
SARAH WOLF ET AL.

Mechanic's Lien—Architect's Certificates—Fraudulent Refusal to Deliver—Amendment.

A decree awarding a mechanic's lien having been previously considered herein, the same having been reversed and the cause remanded, after which complainant amended his bill, alleging, among other things, that the architect had fraudulently and without cause, refused to deliver to him certain certificates calling for amounts due and unpaid, this court holds that such view is not supported by the evidence, and declines to interfere with the decree in behalf of the defendants.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. LEVI SPRAGUE, for appellant.

Mr. M. SOLOMON, for appellees.

GARNETT, J. At a former term this case was before this court, under the title of *Wolf v. Michaelis*, and the decree was then reversed and the cause remanded. After the re-docketing of the case in the Circuit Court, the complainant,

Michaelis, by leave of court, amended his bill, alleging in the amendment, among other things, that he had demanded of the architect, certificates for the fifth and sixth installments specified in the contract, but that the architect had fraudulently and without any valid reason, refused to deliver the same to the complainant. It is not denied that the allegations of fraud are sufficient, but upon examining the evidence introduced in support of them, as well as that offered by defendants to the contrary, we think the Circuit Court correctly held that no case was made out under the amendment. In all other respects the case is governed by our former opinion in 27 Ill. App. 336. The decree is affirmed.

Decree affirmed.

JAMES MAGNER AND Z. R. WINSLOW

V.

H. J. TRUMBULL & Co.

Practice—Insufficient Abstract.

The court declines to consider the case presented, for the reason that the appellant failed to file an abstract of the evidence.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

Messrs BANGS & BANGS, for appellants.

Mr. E. C. FERGUSON, for appellees.

GARY, P. J. The brief for the appellants indicates that they are endeavoring to pay an honest debt to the appellees with a technical rule of law; but as no abstract of the evidence, only an index to the names of the witnesses has been filed, the court will not look to see whether the rule applies. C. & G. T. Ry. v. Crolie, 33 Ill. App. 17. The judgment is affirmed.

Judgment affirmed.

33 646
46 647
33 648
50 649
50 650
33 646
55 423
33 646
57 611
33 646
59 318

UNION SAFE DEPOSIT COMPANY

v.

JAMES W. CHISHOLM.

Sales—Real Property—Contract—Conditions—Title—Payment—Forfeiture of—Installments—Abstract—Waiver of Objections—Damages.

1. The term, "abstract of title" means a statement in substance of what appears on the public records affecting the title to the property in question.

2. A waiver as to one objection to a title, does not absolve the seller from endeavoring to remove another objection, such removal being made one of the conditions of carrying out the sale.

[Opinion filed December 2, 1889.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. GEORGE S. WILLITS and HENRY S. ROBBINS, for appellant.

Mr. ISAAC E. ADAMS, for appellee.

GARNETT, J. By contract in writing, dated November 9, 1887, appellant agreed to sell to appellee a tract of land in Chicago for \$15,000, of which the sum of \$500 was then paid, and the balance was to be paid in installments. One of the stipulations of the contract was this :

"It is hereby agreed, that, should the title to said property be found to be unmerchantable and bad upon examination (such examination to be made within ten days from delivery of abstract), then all payments made in pursuance of this contract shall be refunded. But should the said James W. Chisholm fail to perform the contract on his part promptly at the times and in the manner above specified (time being the essence of this contract), then the above mentioned first cash payment shall be forfeited by said J. W. Chisholm as liquidated damages, and the above contract shall be and become null and void."

There was evidence tending to prove these facts: The abstract of title to the property was delivered December 8, 1887, by appellant to the attorneys of appellee, who were authorized by him to examine it and decide for him whether it should be accepted or rejected. The abstract showed that the title was traced through a suit for foreclosure of a trust deed, but the last step appearing from the abstract was a certificate of sale to W. C. D. Grannis made in pursuance of the foreclosure sale. So far as appeared from the abstract, appellant was a stranger to the title. The attorneys of appellee, having examined the abstract, prepared an opinion in writing, noting therein four objections to the title, the first having reference to a possible right of dower in the wife of one Daly, and the last to the absence of a master's deed on the certificate of sale. On December 17, 1887, appellee informed the secretary of appellant of the objections made by his attorneys, and told him he would not take the title, unless they were made right. The master's deed was procured by appellant (Grannis having previously assigned the certificate of sale to appellant) and left at the recorder's office for record. But the deed was never shown, or tendered to, or seen by appellee or his attorneys, nor was any additional abstract made or tendered by appellant. On February 8, 1888, appellee, by his attorneys, notified appellant that he had annulled the contract for the reason that the title had not been made good. Appellant denied his right to do so, claiming that a good and merchantable title had been furnished, and that appellee had forfeited the \$500 deposited. Thereupon this suit was brought by appellee to recover the \$500 and he had judgment in the Circuit Court, which appellant now prays may be reversed.

It is probable that more emphasis was given to the dower question by Chisholm's attorneys than it deserved; but through the entire negotiation which followed the discovery of the insufficiency of the abstract, we find no waiver of the last objection made by them. No effort appears to have been put forth by appellant to remove the objections beyond having the deed executed and recorded and notifying appellee's

attorney thereof. Examination of the record might have been made by appellee's attorneys, but the contract required no such exertion, and, moreover, a reading of the original master's deed or the record of it, might not have been a protection to appellee. He could not, in that way, derive any information as to the judgments against, and conveyances by, the grantee in the master's deed. The contract provided for the delivery of an abstract, and an abstract means a statement, in substance, of what appears on the public records affecting the title to the property. *Chase v. Heaney*, 70 Ill. 268; *Warvelle on Abstracts*, 3.

Perhaps in the treaty between the parties for clearing away the points made against the title, there was a waiver of any additional abstract, or the production of the master's deed. But the waiver, if any, was conditional.

That which must be depended upon as a waiver was the consent of appellee's attorneys to go to the record to examine the master's deed when the other objections were removed. The waiver might have been entirely withheld, or, if given, it was within the power of the appellee to couple it with such conditions, reasonable or unreasonable, as were deemed advisable.

Admitting that the point on the supposed dower interest was unreasonable, it is, nevertheless, true that appellee was firmly and, to all appearances, in good faith, insisting upon it as a serious objection to the title. Having made the removal of that objection one of the conditions, the waiver is not available to appellant except upon compliance therewith. The record fails to show that any evidence was ever given to appellee to clear up the dower question, and having failed in that respect to comply with the conditions, appellant can not be permitted to rely on the waiver.

The judgment is affirmed.

Judgment affirmed.

GEORGE D. BARRETT ET AL.

v.

REGINA LINGLE.

Judgments—Assignments—Priority—Satisfaction—Motion to Set Aside—Remedies—Court of Equity.

Upon an appeal from an order setting aside the satisfaction of a judgment assigned to another, a previous assignment thereof having been made, this court holds that the various questions involved can not be settled upon such appeal, and that resort must be had to proceedings better calculated to attain the end in view.

[Opinion filed December 2, 1889.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. WHITEHEAD & PICKARD, for appellants.

Mr. R. P. BLANCHARD, for appellee.

GARY, P. J. This record shows that the appellee recovered a judgment against the appellants; that she assigned it to one Blanchard; again assigned it to one Fay, for the benefit of Barrett; that on the judgment docket the first assignment was noted, and ten minutes thereafter the second was; that the second assignee entered satisfaction of the judgment, and on motion of the appellee the court set aside the satisfaction. From that order this appeal was taken.

Fay paid appellee \$465, not money of either of the appellants. The object of Fay in buying the judgment was to use it, under a previous arrangement, in a trade with Barrett. Appellee tendered the money back to the appellants, but not to Fay. The disputed question of fact in the case is whether, when Fay took an assignment, it was with notice of the prior assignment, and on that last question a material witness refused to make an affidavit.

Beattie v. The People.

The validity and priority of these assignments, the respective considerations of them, the interest of Fay, are questions that ought not to be determined without full information as to the facts. The remedy by motion is imperfect.

The principle of Day v. Graham, 1 Gilm. 435, approved under same title, reversed in 4 Gilm. 389, and in Jackson v. Merriweather, 109 Ill. 647, requires a resort to a court of equity. The order appealed from is reversed that recourse may be had to a mode of proceeding where the whole truth can be ascertained and complete justice done. Order reversed and cause remanded.

Reversed and remanded.

CHARLES J. BEATTIE

V.

THE PEOPLE EX REL. ETC.

Contempt—Attorney—Introduction of False Testimony—Divorce—Bogus Decree—Limitations—Sec. 4, Div. 4, and Secs. 5, 6, 7 and 20, Div. 2, Chap. 38, R. S.—Sec. 225, Chap. 38, R. S.—Felony—Misdemeanor.

1. Acts in disrespect of a court or its process which obstruct the administration of justice are in the nature of criminal offenses, and in such cases the prosecutions must be in the name of the people.

2. An attorney who procures false evidence, knowing it to be false, with the intention of deceiving the court, is not only guilty of contempt of court, but of subornation of perjury, a felony, as well.

3. Upon motion to commit for contempt an attorney adjudged to be guilty of the presentation in a given case of testimony known by him to be false, and in issuing a fictitious copy of a decree for a divorce therein, this court holds that the prosecution of the charge of contempt was barred by the statute of limitations of one year and six months under Sec. 4, Div. 4, Chap. 38, R. S.

[Opinion filed December 2, 1889.]

IN ERROR to the Superior Court of Cook County; the Hon. ROBERT JAMIESON, Judge, presiding.

33	651
41	138
33	651
51	499
33	651
72	178

Messrs. W. P. BLACK and C. S. BEATTIE, for plaintiff in error.

The alleged contempt is within the bar of the statutes of limitations. This is a criminal case and the proceedings are criminal proceedings. *Clark v. People*, Breese, 266; *Stuart v. People*, 3 Scam. 295; *Haines v. People*, 97 Ill. 161; *Hill v. Crandall*, 50 Ill. 70; *People v. Neil*, 74 Ill. 68.

Being a criminal offense it is either a felony or a misdemeanor. And as the punishment may be less than that provided for felony it is a misdemeanor. This subject is fully discussed and settled in *Lamkin v. People*, 94 Ill. 501.

Any number of pages might be written upon the application of the eighteen months limitation to this misdemeanor, and yet not be so satisfactory as this *Lamkin* case. And the only reason ever heretofore assigned, so far as counsel are advised, why the bar of the statute did not reach this kind of cases, is the suggestion of the judge below, in passing upon this case as found in the *Law Bulletin* of March 29, 1889, from which we quote:

"The scope of this statute is not as broad as counsel seems to regard it. It does not limit to one year and six months the commencement of 'all criminal proceedings of every kind below the grade of felony;' it simply limits 'all prosecutions by indictment or otherwise, for misdemeanors.'

"The question then is, is this offense a misdemeanor as defined by our statute? If it is, then the proceedings must be quashed. The statute says: 'A felony is an offense punishable with death or by imprisonment in the penitentiary. Every other offense is a misdemeanor. Where the performance of any act is prohibited by statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor, and may be punished by fine,' etc.

"It will be seen from this that the Legislature has defined a misdemeanor to be every offense lower than a felony prohibited by statute; and therefore the statute limiting prosecutions for misdemeanors to one year and six months applies only to such acts, lower than felonies, as are prohibited by statute.

“ Misdemeanors at common law are divided into two classes: first, such as are penal at common law, and second, such as are penal by statute. It is the latter class of misdemeanors which our statute defines, and it is to that class only the limitation applies. The misconduct charged in these proceedings does not come within the category of acts prohibited, or penal by statute, and therefore is not affected by the statute limiting prosecutions for misdemeanors.

“ The principle here contended for is, I think, recognized in the case of *The People ex rel. Ebenezer Noyes v. Francis A. Allison*, 68 Ill. 151. That was an information filed in the Supreme Court for a rule upon Allison to show cause why his name should not be stricken from the roll of attorneys. In discharging the rule the court says: ‘ Nearly seven years have elapsed since the alleged misconduct. No explanation is given for the delay, and the law will not favor prosecutions of this character after the lapse of such a great length of time. * * * The parties whose rights are injuriously affected by conduct of the character alleged, ought to exhibit his information within a reasonable time. * * * In analogy to our statutes which bar prosecutions for misdemeanors, there ought to be a limit as to the time in which information could be filed.’ ”

It seems then, according to the opinion of the judge below, that a certain class of misdemeanors, to wit, “ those not made so by statute,” are not within the bar of any statute of limitations.

In defining misdemeanors our statute does not recognize two classes. “ Every other offense (than felony) is ‘ a misdemeanor,’ ” whether made so by common law or by statute, and whether the punishment is provided by common law or by statute. And so that no question may arise, a class of cases made offenses by statute, and *to which no punishment had been affixed*, are declared to be misdemeanors.

The case of *People ex rel. Noyes v. Allison*, 68 Ill. 151, cited by the judge below, and the reasoning based by him thereon, has no application to the question here. “ Striking an attorney’s name from the roll is not viewed as punishment for contempt.” *Rapalje on Cont.*, Sec. 15, and cases cited.

Mr. JOHN A. ROSE, for defendant in error.

It is contended by counsel for Beattie that the statute of limitations relating to misdemeanors includes contempt proceedings. In other words, they say: Admitting that Beattie is an officer of the court; admitting that as such officer Beattie did manufacture testimony and offer it upon the trial of the Gordon case, and thereby prostitute the court for gain; admitting that he did knowingly give to the complainant in that case a paper purporting to be an absolute decree of divorce, knowing at the same time that none had been granted, and did thereby commit an atrocious fraud upon his client; admitting that it did not come to the knowledge of the court before which, and against which, these contemptible frauds were committed, until more than eighteen months after they were committed, and admitting that the court did move at once upon receiving proper information that they had been committed; admitting all this, they say, what of it? This occurred more than eighteen months ago; this is barred; you are powerless to vindicate the dignity of the court; powerless to punish a trusted officer of the court for basely imposing upon it and upon a client. It is true he did all these things, but he covered his tracks so well that you did not find it out until more than eighteen months after it was committed, and now we would be pleased to know what you are going to do about it?

Criminal contempts are defined to be direct, such as are committed in the presence of the court while sitting judicially; and constructive, such as, though not committed in the presence of the court, yet tend to obstruct, embarrass, or prevent the due administration of justice therein. *People v. Wilson*, 64 Ill. 195; *Whittem v. State*, 36 Ind. 196.

And superior courts of record have always exercised the power by contempt to punish their officers for negligent, corrupt or oppressive conduct, whereby injury has been wrought upon third parties, and whereby the court itself and the administration of justice have been brought into disgrace. *Cartwright's Case*, 114 Mass. 230; *In re Pitman*, 1 Curtis, 186; *Yates v. Lansing*, 9 Johns. 395.

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Criminal contempts are offenses against the State, and are so because they are offenses against the administration of justice; and the act which so constitutes an *offense* against the State, may or may not constitute a *crime* against the State; or, restated, the act which constitutes a contempt, may be a felony, as subornation of perjury by an attorney (State v. Holding, 1 McCord (S. C.) 379); may be a misdemeanor, as an assault by an attorney in a court room (Middlebrook v. State, 43 Conn. 257); or may be neither the one nor the other, as for a Jew to refuse to be sworn on Saturday (Stansbury v. Marks, 2 Dallas (Pa.), 213; and a court can rightfully punish it on summary conviction, whether the same act be punishable as a crime on indictment or not; a conviction on indictment will not purge the contempt, nor will a conviction for a contempt be a bar to an indictment; the offense may be double; and so are the remedy and the punishment. Middlebrook v. State, 43 Conn. 257.

The power of the courts in this regard being founded on the principle of self-preservation, it does not at all deprive them of it that the law has provided some other mode for punishing the offender; it is quite immaterial that the offense is indictable. Rex v. Lord Ossulston, 2 Strange, 1107; Sub. Nom. King v. Pierson, Andrews, 310.

And the right of punishing contempts by summary conviction is inherent in all superior courts of justice, and is essential for their protection and existence. It is a branch of the common law adopted and sanctioned in this State. The discretion involved in this power is in a great measure arbitrary and undefinable; and yet the experience of ages has demonstrated that it is perfectly compatible with civil liberty, and auxiliary to the purest mode of justice, and the known existence of such a power prevents, in a thousand instances, the necessity of executing it. Cartwright's Case, 114 Mass. 230; Middlebrook v. State, 43 Conn. 257; People v. Wilson, 64 Ill. 195.

What are superior courts within the meaning of this rule is an important subject of inquiry, and it may be stated at the outset that it is not at all necessary to the inherent power of

the court to fine and imprison for criminal contempt, that it should have criminal jurisdiction. The Court of Common Pleas in England had no criminal jurisdiction, but its inherent power in this regard was never questioned. So the Court of Common Pleas of Connecticut has no criminal jurisdiction, but its power in this regard, when questioned, was distinctly affirmed. *Middlebrook v. State*, 43 Conn. 257.

The power to punish for contempt being inherent in courts of justice, and necessary to enable them to preserve their dignity and enforce their process, and so attain the ends of their creation, the power of the Legislature to regulate the same may well be doubted. *Arnold v. Commonwealth*, 80 Ky. 300; *Ex parte Robinson*, 19 Wal. 510; *Re Wolley*, 11 Bush (Ky.), 95.

If the court is created by the constitution, and the Superior Court of Cook County is a constitutional court, it is clear upon principle that the Legislature has no such power unless it is conferred upon it by the constitution, and it has been so decided. *State v. Merrill*, 16 Ark. 384.

"In the absence of constitutional provision on the subject, the better opinion seems to be that legislative bodies have not the power to limit or regulate the inherent power of courts to punish for contempt. This power being necessary to the very existence of a court, as such, the Legislature has no right to take it away or hamper its free existence. This is no doubt true in the case of a court created by the constitution. Such a court can go beyond the provisions of the statute in order to preserve and enforce its constitutional powers, by treating as contempts acts which may clearly invade them." *Rapalje on Contempt*, Sec. 111.

"If the court be created and its jurisdiction conferred by the constitution, then the power to punish for contempts in such court also exists by virtue of the constitution, and the Legislature can not deprive the court of such power." *State v. Frew*, 24 West Va. 460. "The power to punish for contempts is incidental to all courts of justice, independently of statutory provisions." *Clark v. People*, Breese, 340. "Courts possess the power to punish contempts independently of leg-

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isolation, and this power is one the Legislature can neither destroy nor abridge." *Holman v. State* (Ind.), 5 N. E. Rep. 556.

"The constitution has established the judiciary and made it a co-ordinate department of the State government, and necessarily incidental is the power to punish for contempts. This power is incidental to all courts of justice independently of statutory provisions." *People v. Wilson*, 64 Ill. 225.

"It is conceded that a court has the inherent power to punish, by fine and imprisonment, for contempt; and, it might be added, the Legislature has no power to take from the court the power to protect itself from such flagrant contempts as are offered to the court in this particular case. To sanction the exercise of such legislative action would, in effect, defeat the administration of justice." *Arnold v. Commonwealth*, 80 Ky. 300.

"The Legislature can not take away from a court any jurisdiction given to it by the constitution." *Burns v. Henderson*, 20 Ill. 264.

"The statutory enumeration of acts constituting contempts can not be taken as the arbitrary measure of an inherent power of the court to punish for contempt." *Hughes v. People*, 5 Col. 436.

"The Legislature has no power to abridge the jurisdiction of the Circuit Court." *Meyers v. People*, 67 Ill. 509; *Wilson v. People*, 94 Ill. 426.

"Under the constitution there is no distinction between the Superior Court of Cook County and the Circuit Court of Cook County; both courts have the same jurisdiction and exercise the same powers." *Berkowitz v. Lester* (Ill.), 11 N. E. Rep. 860.

"The Superior Court of Cook County has the same powers as the Circuit Court." *Jones v. Albee*, 70 Ill. 34; *Samuel v. Agnew*, 80 Ill. 553.

In a contempt of court there may be the element of contumacy, and all cases of contempt which contain this element are called criminal contempts, and their punishment, in consequence, is termed a criminal proceeding; but this is not,

strictly speaking, accurate; as a contemnor is not entitled to many, if any, of the rights of trial guaranteed a criminal.

1. A criminal proceeding can only be begun in a superior court by indictment or information. Neither is necessary in case of contempt.

"This (a criminal contempt) is not, strictly speaking, a criminal proceeding, for such a charge must either be presented by indictment or information." *Whitman v. State*, 36 Ind. 203; *Teller v. People*, 7 Col. 45.

2. In a criminal proceeding, the prisoner is entitled to a trial by jury, a contemnor is not.

"In a proceeding for contempt the party is not entitled to trial by jury." *Neil v. State*, 9 Ark. 259; *Hughes v. People*, 5 Col. 436.

3. A contemnor is never entitled to a change of venue; a prisoner may be.

"Information against persons for contempt, are not within the meaning, nor of the character of information, in the 5th section of the act in relation to change of venue. Rev. Stat. 528. Informations, within the meaning of said act, are such as are punishable under the provisions of the criminal code," etc. *Crook v. People*, 16 Ill. 535.

4. It is very doubtful whether the executive has the power to pardon a contemnor; he certainly has to pardon a criminal. It has been held that he has that power, but as respectable an authority as Judge Story holds that he has not.

I contend that the statute of limitations applicable to misdemeanors does not cover prosecutions for contempt; that statute applies only to prosecutions based upon indictment of a grand jury, informations filed *ex officio* by the state's attorneys, and on appeals from justices of the peace, etc.

In the statutes of 1845 (Sec. 5, p. 528) providing for changes of venue in criminal cases, the opening sentence is as follows: "That when any defendant in any indictment or information in any court of this State," etc.

The statute then goes on and provides in what cases change of venue shall be allowed. In a case of contempt, the contemnor prayed a change of venue, and relied upon that statute

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in its support. The Supreme Court of this State held that the word information in that statute did not relate to contempts, and in the opinion used the following language:

“Informations against persons for contempts in disturbing the order of court in the presence or out of it, are not within the meaning nor in the character of informations, in the fifth section of the act in relation to change of venue. Rev. Statutes, 528. Informations within the meaning of said act, are such as are punishable under the provisions of the criminal code upon presentment of the grand jury, informations filed *ex-officio* by the state’s attorneys, and appeals from justices of the peace,” etc. Crook et al. v. People, 16 Ill. 535.

The opening sentence of the statute of limitations is: “All prosecutions by indictment or otherwise for misdemeanors,” etc. I contend that the word “otherwise” as there used means information by the state’s attorney, appeals from justices, etc., and does not include informations for contempts. This position, in my judgment, is fully sustained by the Crook case.

I have searched the books in vain for a contempt case in which the statute of limitations was interposed.

The case which, in my judgment, is most analogous to this, is one for the disbarment of an attorney. In a recent case of that nature in California this defense was interposed, but was held bad. The court says: “As to the objection made that the offenses charged are barred by the statute of limitations, it appears that the acts complained of were committed some three years since. We do not understand that a charge of this kind can be barred by the statute of limitations, or that it should be under any circumstances. The fullest opportunity should be given to investigate the conduct of an attorney who is charged with a violation of his duties as such.

“We are not prepared to say, as a matter of law upon this demurrer, that the accusation is barred either by the express terms of the statute of limitations or by analogy.” In re Lowenthal, 21 Pacific Reporter, 7.

The same doctrine is virtually announced in *The People, etc., v. Allison*, 68 Ill. 151, the court holding that in a case of that nature the information should be filed within a reasonable time.

GARNETT, J. Charles J. Beattie, an attorney at law practicing in Chicago, was employed by Ada E. Gordon to procure a divorce for her from her husband, George B. Gordon. To that end he filed a bill for divorce in her name against her husband in the Superior Court of Cook County, on March 4, 1877, charging the defendant with cruelty, desertion and adultery. The husband, being a non-resident, was served by publication. The cause came to a hearing on May 7th of that year, the defendant having been defaulted for want of appearance. The deposition of James L. Watson, which was taken by Beattie before a notary public, was read on the hearing, and Mrs. Gordon testified orally in her own behalf. The judge before whom the case was tried was not satisfied with the evidence, and continued the hearing to the 27th of the same month. After the hearing on May 7th, and on the same day, Beattie delivered to Mrs. Gordon what purported to be a copy of a decree of divorce in the cause, and she, later in the same day, was married to one Wilson.

On May 27th Beattie again appeared in court and called R. J. Coffeen as a witness. Watson and Coffeen testified to the same acts of infidelity by the defendant, and upon their evidence a decree was entered the next day, May 28th, divorcing Ada E. from George B. Gordon on the ground of his adultery. At the February term, 1889, of the Superior Court, George B. Gordon filed a petition to vacate the decree, alleging that the testimony of Watson and Coffeen was untrue, and on March 7th he filed a second petition alleging that the charge of adultery against him was false, and that he believed that Beattie, without the knowledge of Mrs. Gordon, procured said witnesses to sustain the charges of the bill, knowing that they had no knowledge of adultery of the petitioner, and that on May 7, 1887, before any decree was entered, Beattie delivered to said Ada a paper purporting to be a true copy of decree entered in said cause, and praying that a rule might issue against Beattie to show cause why he should not be attached for contempt. A rule to show cause was entered, Beattie came in March 12th, denied the contempt, and moved for an order requiring the petitioner to file interrogatories,

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which was done. Beattie answered the interrogatories, and upon the issues formed, the court adjudged him guilty of contempt in the presentation of testimony which he knew to be false, and in issuing to Ada E. Gordon a fictitious copy of a decree for a divorce in the case, and sentenced him to imprisonment in the county jail for a year and to pay a fine of \$500 and costs.

On the hearing of the motion to commit for contempt, appellant moved the court to dismiss the prosecution on the grounds that the same was barred by the statute of limitations of one year and six months, and that is the defense requiring consideration. The statute (Sec. 4, Div. 4, Chap. 38) is as follows: "All prosecutions, by indictment or otherwise, for misdemeanor, or for any fine or forfeiture under any penal statute, shall be commenced within one year and six months from the time of committing the offense, or incurring the fine or forfeiture, except as otherwise provided by law." Sec. 5 of Div. 2, Chap. 38, describes a felony as "an offense punishable with death, or by imprisonment in the penitentiary," while by Sec. 6, "Every other offense is a misdemeanor. Where the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor, and may be punished by fine not exceeding \$100, or imprisonment in the county jail not exceeding six months, or both, in the discretion of the court." This is not the case of a civil contempt, in which the action of the court is for the benefit or advantage of another party to the proceeding, but appellant is charged with a criminal contempt in doing that which obstructs the administration of justice. See *Rapalje on Contempts*, Sec. 21.

The Supreme Court of this State has uniformly held that acts in disrespect of the court, or its process, which obstruct the administration of justice, are in the nature of criminal offenses. *Stuart v. The People*, 3 Scam. 395; *Haines v. The People*, 97 Ill. 161; *The People v. Neill*, 74 Ill. 68.

In this the Supreme Court of the United States fully agrees, having decided that a contempt of that kind is a specific criminal offense, and the imposition of a fine, therefore, a

judgment in a criminal case. *New Orleans v. The Steamship Co.*, 20 Wal. 387.

The prosecution in such cases must be in the name of the people. The punishment is either by fine or imprisonment, or both. If the accused is acquitted, the people can neither have an appeal, nor maintain a writ of error (*People v. Neill, supra*), the reason given being that a proceeding for contempt in thwarting the process of the court was a prosecution in behalf of the people and in the nature of a criminal proceeding.

"Many acts are both contempts of court and indictable crimes. * * * The indictment and the proceeding for contempt are entirely distinct and neither will be a bar to the other." 2 Bishop on Criminal Law, Sec. 264.

An attorney who procures false evidence, knowing it to be false, with the intention of deceiving the court and thus interfering with the due administration of justice, is not only guilty of contempt of court, but of subornation of perjury, a felony punishable by imprisonment in the penitentiary not less than one year, nor more than fourteen years. Sec. 225, Chap. 38, R. S. The punishment of contempt fixes its character as a misdemeanor, as the penalty may be either by fine or confinement in jail, or both. *Lamkin v. The People*, 94 Ill. 501.

No doubt can be entertained that the prosecution of the felony (subornation of perjury) may be barred in three years, but the State contends that the minor offense (contempt of court) may be punished whenever the machinery of the law is set in motion. And the sentence of the Superior Court proceeded upon the theory that the limitation is only applicable to misdemeanors prohibited by statute, and as there is no prohibitory statute for this class of contempts, the offender is exposed to punishment without limit as to time of instituting the proceedings. If this peculiar intent is to be attributed to the Legislature, it must be made very plain from the language of the statute. That there is any good reason for greater lenity in dealing with offenses prohibited by statute than those governed by common law, has not been suggested. The more flagrant the offense, the more natural it is that the Legislature

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should attempt to repress it by express statute, and the more remote the probability that to such cases a special and discriminating favor should be extended. It can not be supposed that the law intended relief and immunity, after the lapse of a year and six months, for all misdemeanors prohibited by a statute, while offenses of the same class recognized by common law only, are exposed to prosecution at any time during the life of the offender.

The fact that the contempt charged against Beattie is one of the gravest character, can not affect the application of the rule. If the bar of the statute is denied here, it must be denied to all classes of misdemeanor, however trivial, which have escaped the denunciation of statute law. Adopting that rule, such offenses are as far removed from oblivion by lapse of time as murder, which may be the subject of indictment at any period after the death of the person killed. All felonies except arson and forgery, are barred in three years, if the accused during that time is usually and publicly resident within this State.

A felony, however, is uniformly treated as deserving of greater odium and severer punishment than any misdemeanor. For some misdemeanors, it is true, the jury may in their discretion imprison in the penitentiary. But if alternative penalties are provided, one of which is imprisonment in the county jail or fine, the offense is a misdemeanor, although the accused might have been confined in the penitentiary, in the discretion of the jury. *Lamkin v. The People, supra.*

Imprisonment in the penitentiary is the last penalty for a felony, and Sec. 7, Div. 2, Chap. 38, declares every person convicted of certain felonies, including subornation of perjury, infamous, and the offender is rendered incapable of holding any office of honor, trust or profit, of voting at any election or serving as a juror, unless he is again restored to such rights by the terms of pardon or otherwise, according to law. With these provisions of the statute before us, we can not believe that Sec. 4, Div. 4, Chap. 38, was intended to exclude from the benefit of the one year and six months limitation, all misdemeanors not prohibited by statute. Indeed, the section provides that *all* prosecutions, by indictment or

otherwise, for misdemeanors, shall be commenced within one year and six months from the time of the committing of the offense, while Sec. 6, Div. 2, describes every offense as a misdemeanor which is not punishable by death or imprisonment in the penitentiary. These sections are so plain and unambiguous that nothing short of a strained and unnatural interpretation can find a distinction in them between the two classes of misdemeanors now under discussion. Neither can it be said that the Legislature in passing those sections, overlooked common law misdemeanors, and so had no intention to provide a limitation for misdemeanors not prohibited by statute. For, aside from the aversion of courts to the discovery of legislative oversight when the law is expressed in plain terms, we have positive evidence in Sec. 20, Div. 2, Chap. 38, that the subject of the offenses not prohibited by statute was under consideration, and the existence of misdemeanors not defined by statute recognized, as it is declared by that section that "all offenses not provided for by statute law may be punished by fine or imprisonment in the discretion of the court, provided the fine shall in no case exceed \$500, and the imprisonment one year."

The People v. Allison, 68 Ill. 151, relied on by the State, does not decide the question now presented, but the court does say: "In analogy to our statutes which bar prosecutions for misdemeanors, there ought to be a limit as to the time in which the information could be filed."

Another argument for the State is that the power to punish for contempt is inherent in all courts, and necessary to preserve their dignity, enforce their process, and so attain the end of their creation; and if the court is created by the constitution, as the Superior Court is, the Legislature is without authority to prohibit the exercise of the power of the court. All that might be admitted, and we deny no part of the assertion when we say that the power to punish for contempt, without limit as to time, is not necessary to preserve the dignity of the court, or to enable it to enforce its process, or to attain the ends of its creation. Nor do State v. Merrill, 16 Ark. 384; Middlebrook v. State, 43 Conn. 257; Arnold v. Commonwealth, 80 Ky. 300; Ex parte Robinson, 19 Wal. 510;

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Re Wolley, 11 Bush (Ky.), 95, deny the right of the Legislature to *regulate* the punishment of contempt. On the contrary, all of those cases (except 19 Wal. 510, where a doubt is expressed) recognize the right of the Legislature to regulate the power, but not to destroy or withdraw any part of it. These authorities do not appear to go as far in that direction as *Stuart v. People*, 3 Scam. 395, where it was said that the statute then in force might, with great propriety, be regarded as a limitation upon the power of the courts to punish for any other contempt than those named therein.

The statutes of limitation are no longer frowned upon by the courts, but are regarded as beneficent laws, promotive of peace and repose in the community, and not requiring anything unreasonable from those whose rights may be affected by their operation.

In *Lamkin's* case, the Supreme Court quotes approvingly the remarks of Mr. Wharton in relation to such statutes, as follows: "Here the State is the grantor, surrendering by act of grace its right to prosecute, and declaring the offense to be no longer the subject of prosecution. The statute is not a statute of process, to be scantily and grudgingly applied, but an amnesty, declaring that after a certain time oblivion shall be cast over the offense; that the offender shall be at liberty to return to his country and resume his immunities as a citizen, and that from henceforth he may cease to preserve the proofs of his innocence, for the proofs of his guilt are blotted out. Hence it is, that statutes of limitation are to be liberally construed in favor of the defendant, not only because such liberality of construction belongs to all acts of amnesty and grace, but because the very existence of the statute is a recognition and notification by the Legislature of the fact that time, while it gradually wears out proofs of innocence, has assigned to it fixed and positive periods in which it destroys proofs of guilt."

The members of this court are all of opinion that the prosecution of the charge of contempt was barred by the statute of limitations, when this proceeding was commenced.

The sentence of the Superior Court is reversed.

Judgment reversed.



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ACTIONS.

1. A creditor may bring suit for the recovery of money due and unpaid, without waiting for the time to arrive when the debtor promises that payment shall be made. *Coughlin v. Gutta Percha & Rubber Mfg. Co.*, 71

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1. A deed, the consideration of which was not valuable, can not be reformed, no matter how meritorious the consideration or motive for making it may have been. *Lynn v. Lynn*, 299

2. In the case of powers, equity will not aid an imperfect execution for the benefit of grandchildren. *Id.*, 299

3. Upon an appeal, in administration proceedings, from a decree of sale of real estate for the payment of debts, the fact being that the will under which the same was derived by deceased, was followed by a deed by the maker thereof, attempting to convey the property in question in trust for a person since deceased, and surviving grandchildren, said property having been misdescribed therein, this court holds that said deed can not be reformed, that the will in question vested a good title in the beneficiary named therein, and declines to interfere with such decree. *Id.*, 299

4. Upon an appeal from an order and judgment entered by the Circuit Court, disallowing a claim filed originally in the Probate Court against the estate of a deceased person, this court holds that the guaranty by him and another upon the formation, with others, of a corporation, of the payment to it of certain indebtedness claimed to be due them, the same being contributed by them toward the assets thereof, amounted to a guaranty that the indebtedness existed as well as that payment should be made; that the assignment thereof to the corporation carried in equity all the securities the guarantors had for its payment; that the original agreement, being under seal, is joint and several under Sec. 3, Chap. 76, R. S., and that defendant was properly proceeded against; that the second agreement given by the said guarantors is competent and sufficient evidence of the transfer of the indebtedness to the corporation and of its equitable right to the performance of the guaranty, or damages in lieu thereof, and that a Probate Court has jurisdiction of such equity against an estate in the course of administration. *Union Oil Co. v. Maxwell*, 421

AGENCY.

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4. One who attempts to act as the agent of both parties to a transaction without disclosing that fact to his principals, is precluded from recovering compensation for his services. *Boyd v. Dullaghan*, 266

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6. In an action to recover a balance claimed to be due under a contract to canvass a given county for the sale of a subscription book, this court declines, in view of the evidence, to interfere with the judgment in behalf of the plaintiff. *Peale v. Hill*, 444

7. In an action to recover upon an alleged breach of warranty of the quality of certain hams, this court holds that the defendant was the agent of the plaintiff in the purchase of the same, not the vendor thereof, and that the judgment against him can not stand. *Huster v. Gordon*, 464

8. If, in the exercise of his duties, an agent is intrusted with the operation of a dangerous machine, to guard himself from personal liability he must use proper care in its management and supervision so that others in the use of ordinary care will not suffer in life, limb or property. Such duty is a common law obligation, and is neither increased nor diminished by his entrance upon the duties of the agency, nor can its breach be excused by the plea that his principal is chargeable. *Baird v. Shipman*, 503

9. An agent in undertaking and entering upon the execution of a particular work, is bound to use reasonable care in the manner of executing it, so as not to cause any injury to third persons, which may be the natural consequence of his acts, and he can not, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to third persons who suffer injury by reason of his having so left them without proper safeguards. *Id.*, 503

10. In an action against real estate agents for the recovery of damages for the death of a third person rightfully upon premises owned by a non-resident, and in their charge, it being alleged that the same occurred through the dangerous condition of a stable door thereon, this court declines to interfere with the verdict for the plaintiff. *Id.*, 503

APPEAL AND ERROR.—See JURISDICTION §; PRACTICE.

1. The finding of a court in a given case is entitled to the same respect as the verdict of a jury; and in a trial by a court its decision will ordinarily be reversed or affirmed by the same rules which govern when the facts are tried by a jury. *Moran v. Gordon*, 46

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3. This court will not reverse the finding of a jury unless satisfied that it is against the manifest weight of the evidence, or is the result of passion or prejudice, or unless some error of law has intervened. *C. B. & Q. R. R. Co. v. Mehlsack*, 221

4. The failure of a trial court to require counsel for plaintiff to make an opening address to the jury after the evidence is closed and before counsel for the defendant makes his argument, can not be complained of in view of the diverse practice in this regard. *Id.*, 221

5. Error can not be assigned upon rulings which had no influence in producing the findings of the court. *Conrad v. Kloepper*, 228

6. This court will not consider an appeal where no errors are assigned upon the record or attached thereto as required by rule 15 *Bogue-Badenoch Company v. Boyden*, 252

7. Where the evidence is conflicting this court has no authority to set aside a verdict unless the same is shown to be manifestly against the evidence or to have resulted from passion or prejudice. *Hinckley v. Horavdovsky*, 259

8. This court can not consider alleged errors against persons not parties to a given appeal. *McNeill v. Lacy*, 310

9. Alleged errors that do not affect the party complaining can not be considered by this court. *Portoues v. Holmes*, 312

10. This court can not pass upon an alleged erroneous ruling touching the introduction of certain evidence, in the absence of information as to what the answer to the question asked, and to which an objection was sustained, would have been. *Gaffield v. Scott*, 317

11. On a second appeal, questions decided on the former appeal in the same case will not be re-considered. *Allemania Ins. Co. v. Peck*, 548

12. The admission of incompetent evidence not made the subject of exception, can not be assigned as error. *Alexander v. Manderville*, 589

13. In the absence from appellant's abstracts of any exception taken to rulings of the trial court and the instructions given or refused in a case stated, this court will not look into the record to supply the omission. *Parry v. Arnold*, 622

14. An order sustaining a demurrer, not being a final decree, is not appealable. *Maguire v. Woods*, 638

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1. In an action upon an attachment bond given in proceedings in aid of a pending action, this court holds, in view of the fact that said attachment was not of an original character, that the costs thereof are not recoverable herein. *Packer v. Phillips*, 120

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the same first assessed in an action for wrongfully suing out the attachment, notwithstanding the condition is to pay such damages as shall be awarded in a suit subsequently brought upon such ground. *Id.*, 120

3. Upon default after publication in attachment proceedings, judgment for too large an amount can not be cured by a *remittitur*, for the reason that the record can not show that the merits as to the residue, are with the party in whose behalf the same was entered. *Cohen v. Smith*, 344

ATTORNEY AND CLIENT—See GARNISHMENT, 8; PARTNERSHIP, 3.

1. A change of attorney, if not made by voluntary arrangement, must be done by order of court. *Cohen v. Smith*, 344

2. The authority of an attorney of record can not be interfered with until the same is revoked. *Id.*, 344

3. The attendance of an attorney and his conduct of the trial raises the presumption of a retainer and liability to pay usual fees, and damages may be given for a liability to pay as well as for actual payment. *Siegel v. Hanchett*, 634

BAILMENTS.

1. An involuntary, gratuitous bailee is not liable for the refusal of his servant to deliver the goods of another when he has not been informed that application has been made therefor, and has given no orders touching the same. *Amberg v. Philbrick*, 200

BANKS—See GUARANTY, 6.

1. One bank is not liable to an individual for money delivered to it by a second bank, accompanied by a deposit ticket directing that the same be placed to the credit of a third bank, in the absence of notice that the funds in question belonged to such person. *Dumond v. Merchants Nat. Bank*, 95

2. One bank is liable for a deposit with it to the credit of a second bank for the use of an individual, when it delivers the same to a third bank, to be credited to such second bank, without giving notice of the rights of the person in question. *Union Stock Yards Nat. Bank v. Dumond*, 102

3. Upon suit brought by a former depositor against a bank to recover a certain amount alleged to have been wrongfully charged to him by it, this court declines, in view of the evidence, to disturb the verdict for the defendant. *Pugh v. Merchants Bank of Canada*, 353

4. In an action brought by a depositor of an insolvent bank against one of its stockholders, who, under its charter, was liable for its debts to the extent of his stock, this court declines to interfere with the judgment for the plaintiff. *Folz v. Nelke*, 370

5. In an action brought by a bank to recover on a draft upon commission merchants to its order, the amount called for having been paid by it to the drawer, this court holds that the agreement by the commission merchant to honor drafts upon stock about to be shipped, was legally binding upon them, being acted upon by said bank, and that the course of business between the parties, previous to the making of the

BANKS. *Continued.*

draft in question, was such as to warrant plaintiff's claim, and declines to interfere with the judgment in its behalf. *Coffman & Brown v. Clarinda Nat. Bank*, 641

BILLS OF EXCEPTIONS—See PRACTICE, 26.

1. Exhibits written on sheets succeeding the signature of the judge instead of being incorporated in the bill of exceptions, constitute no part thereof. *Harris v. Brain*, 510

BONDS—See REPLEVIN, 2.

1. A bond upon an appeal from a judgment in trover rendered in a justice court is not discharged for the reason that the form of action was changed to assumpsit in the higher court. *Block v. Blum*, 643

2. A mistake in an appeal bond as to the name of the party who recovered the judgment appealed from, is fatal to an action thereon, for the reason that no record of the court appealed to, showing any disposition of a suit between the parties named in the bond, can be produced, and, therefore, that no breach of the condition of the bond can be proved. *Id.*, 643

3. The true intent of such bond may be followed, where the same can be discovered therefrom, without the aid of extrinsic evidence. *Id.*, 643

BROKERS—See AGENCY 2, 3.

1. In an action by real estate brokers for the recovery of commissions, the contention being as to whether the price of the land in question had been raised by its owner, this court declines, in view of the evidence, to interfere with the verdict for the plaintiffs. *Monroe v. Snow*, 280

2. The admixture by a factor of certain grades of wool belonging to different consignors, without keeping account of the property of the different shippers, amounts to confusion, and in proceedings involving the same, the owners must be made whole beyond all doubt. *Trumbull v. Union Trust Co.*, 319

3. The practice of factors to issue what purport to be warehouse receipts covering their own property upon their own premises, does not constitute them warehousemen, nor does such receipt furnish greater protection to its holders than would an unacknowledged chattel mortgage. *Id.*, 319

4. The personal undertaking of a real estate agent to return a sum received by him as a deposit, in case the title to certain property of his principal under contract of sale should be shown to be defective, is not inconsistent with the character of agent. *Mead v. Altgeld*, 373

5. In an action to recover compensation for services rendered in the city of Chicago in negotiating a lease, this court holds that the acts in question are not within the municipal ordinance touching the necessity for real estate brokers to be licensed. *Hamilton v. Harvey*, 499

CARRIERS—See RAILROADS.

1. The conductor of a street car may eject therefrom a person who will not behave with common decency, using such force only as may be

CARRIERS. *Continued.*

necessary for the purpose. But such ejectment must not take place at a time and under circumstances which make it dangerous to life and limb. *Chicago City Ry. Co. v. Pelletier*, 455

CONSTITUTION.

1. Upon a bill filed by a taxpayer of the city of Chicago, to enjoin it from entering into any contract for, or the paying of any money for publishing in the German language matters and things required by law or ordinance to be published in a newspaper, this court holds that under the State constitution, such publication must be in the English language alone. *McCoy v. City of Chicago*, 576

CONTEMPT.

1. Acts in disrespect of a court or its process which obstruct the administration of justice are in the nature of criminal offenses, and in such cases the prosecutions must be in the name of the people. *Beattie v. People*, 651

2. An attorney who procures false evidence, knowing it to be false, with the intention of deceiving the court, is not only guilty of contempt of court, but of subornation of perjury, a felony, as well. *Id.*, 651

3. Upon motion to commit for contempt an attorney adjudged to be guilty of the presentation in a given case of testimony known by him to be false, and in issuing a fictitious copy of a decree for a divorce therein, this court holds that the prosecution of the charge of contempt was barred by the statute of limitations of one year and six months under Sec. 4, Div. 4, Chap. 38, R. S. *Id.*, 651

CONTRACTS—See SETTLEMENT, 2.

1. A party to a written agreement freely entered into, can not deny the truth of the recitals therein. *Ettelsohn v. Kirkwood*, 103

2. In an action by one of two creditors against the other to recover a balance claimed to be due under a written agreement entered into by them evenly to divide the proceeds of such property of a common debtor as might come to the hand of either, this court, upon the ground that the credibility of the testimony was a question for the jury alone, declines to interfere with the verdict for the plaintiff. *Id.*, 103

3. Each and every part of a written contract should, when possible, have assigned to it some meaning. *Hill v. Loudon*, 196

4. The employer of a superintendent of construction under a written contract is not liable for the wages of a third person employed by the latter to perform the work in question, in the absence of knowledge of such employment, and of evidence of a custom authorizing the employment of a second general superintendent in such case. *Id.*, 196

5. The language of the parties to a contract touching the construction of a clause therein stating the damages to be paid in case of the breach thereof, is not controlling, and if a strict construction of the terms used would result in oppression or in contravening the intention of the parties, the courts may inquire into the damages sustained, and make compensation for such injury the measure of damages for the breach. *Bryton v. Marston*, 211

CONTRACTS. *Continued.*

6. In an action for the recovery of a balance claimed to be due under a building contract and for certain extras, this court, in view of the evidence, declines to interfere with a verdict for the plaintiff. *Barton v. Treutler*, 258

7. In the absence of fraud, the certificate of an architect calling for a payment from an owner to a building contractor, is conclusive between the contractor and the owner. *Bournique v. Arnold*, 303

8. The return by a contractor to an architect of a final certificate amounts to the assertion that payment is recoverable without the same. *Id.*, 303

9. In such case no recovery can be had under the contract, the architect refusing the request of the contractor to again deliver the certificate in question. *Id.*, 303

10. In an action by a building contractor to recover for alleged extra labor and damages for delay, this court declines, in view of the evidence, which was conflicting, to disturb the verdict for the defendant. *Daegling v. Illinois Vault Co.*, 341

11. In an action brought to recover a balance claimed to be due under an oral contract to build several houses, and for extra work, this court declines, in view of the evidence, to disturb the verdict for the plaintiff. *Ashford v. Worrell*, 350

12. A building contractor, alone signing a written agreement making the decision of the architect of a given structure final in case of a disagreement with its owner, and the contract price payable in installments upon presentation only of the architect's certificate, said instrument showing upon its face that it was to be executed by both the owner and contractor, and was not to bind either unless both were bound, may recover for services rendered regardless of the same. *Keating v. Nelson*, 357

13. In an action brought for the recovery of damages for the alleged failure of the defendants to perform a certain contract touching the carriage of lumber, this court, in view of the evidence and of the fact that no material errors were committed by the trial court, declines to interfere with the verdict for the plaintiff. *Lenz v. Chicago Lumber Co.*, 396

14. Extra compensation can not be claimed for doing work not better than the contract called for, but better than it otherwise would have been done. *Kinsley v. Charnley*, 553

15. A construction of a contract that nullifies and destroys the same, should not be adopted if it can be avoided. *Dwelling House Ins. v. Butterly*, 626

CORPORATIONS—See INSOLVENCY, 1.

1. The officers of an insolvent corporation must not use up its assets in the payment of their own claims. *McNeill v. Lacey*, 310

COSTS—See ATTACHMENT, 1; JUDGMENTS AND DECREES, 2; LANDLORD AND TENANT, 2.

1. Without a judgment in his favor the plaintiff is not entitled to

COSTS. *Continued.*

costs; if a cause of action is extinguished *pendente lite*, a right to a recovery, and with it the title to costs is gone. *Poppers v. Meager*.

20

2. Mileage for travel outside the State can not be taxed as costs in civil causes. *Fish v. Farwell*,

242

3. The fact that a certain witness was not examined at a given term does not warrant the withholding of his fees. *Id.*,

242

4. A witness may file his affidavit at each term of court, or wait till the term at which the judgment is rendered and then do so showing therein the number of days he attended at each term, in which case the clerk is authorized to make up and enter the costs in the fee book.

Id.,

242

COUNTS—See EVIDENCE, 1, 13, 14.

CRIMINAL LAW—See CONTEMPT.

CUSTOM—See CONTRACTS, 4.

DAMAGES—See CONTRACTS, 5; INSTRUCTIONS, 6; PERSONAL INJURIES, 8, 11, 12; RAILROADS, 7; SALES, 2; TROVER, 4.

1. Where a party agrees in writing to do several things, one of which is to pay a sum of money, and in case of a failure to perform any or either of the stipulations set forth, to pay a larger sum as liquidated damages, the larger sum is to be regarded in the nature of a penalty, and in the absence of evidence of actual damages in an action for a breach of the agreement, nominal damages only may be recovered. *Bryton v. Marston*,

211

DECREES—See JUDGMENTS AND DECREES.

DEPOSITIONS—See EVIDENCE, 9.

DIVORCE—See HUSBAND AND WIFE.

1. It seems that the granting of a divorce to a wife on the ground of desertion, together with the custody of her child, accompanied by the absence of all assistance to the child by its father, amounts to a continuance as to it, of the desertion of the mother and child, which began before the suit for divorce was brought. *Baker v. Strahorn*,

59

2. This court affirms a decree dismissing a bill for divorce upon the ground of collusion. *Belz v. Belz*,

105

3. Proof of the immoderate and habitual use of morphine will not sustain the charge of habitual drunkenness in a bill for divorce. *Youngs v. Youngs*,

223

4. The compulsory participation by a wife in excessive sexual intercourse will not amount to cruelty unless the persistence of the husband is against her will, he knowing that her bodily health will suffer therefrom. *Id.*,

223

5. Upon a bill by a wife for divorce upon the ground, among other things, of extreme and repeated cruelty, this court holds that the acts complained of were condoned by her. *Id.*,

223

DOWER.

1. The fact that a wife received no consideration for a release of her right to dower can not affect the validity of such release. *Scanlan v. Scanlan*, 202
2. Upon a bill brought to redeem certain real estate, and a cross-bill praying that a dower right might be set aside therein, this court holds that the deceased mortgagor, together with his wife, in his lifetime, sold all interest possessed by them in the land in question, and that the consideration therefor was duly paid. *Id.*, 202

DURESS.

1. A payment of money is not to be regarded as compulsory unless made to relieve the person or property in question from the actual and existing duress imposed by the party to whom the money is paid. *Lange v. Soffell*, 624

EMINENT DOMAIN.

1. This court declines to interfere with a verdict omitting to make any allowance for the alleged injury to land remaining after a certain portion needed was taken under condemnation proceedings for street purposes by a municipality. *Goudy v. City of Lake View*, 245

EQUITY—See ADMINISTRATION, 2.

ESTOPPEL—See MORTGAGES 3; PLEADING, 4; RAILROADS, 11.

EVIDENCE—See ADMINISTRATION, 4; AGENCY, 1; APPEAL AND ERROR, 10, 12; CONTRACTS, 1, 2; INJUNCTIONS, 1; LANDLORD AND TENANT, 8, 8; MALICIOUS PROSECUTION, 1; MASTER AND SERVANT, 8; NEGLIGENCE, 3; SALES, 3.

1. Whether silence for an unreasonable time after receipt of an account amounts to an admission of its correctness, or delay in noticing the same was unreasonable, are questions for the jury. *Moran v. Gordon*, 46
2. In an action brought by a contractor, discharged before the completion of his labors, to recover for services rendered, this court holds that the admission of evidence touching the reasonable worth thereof was erroneous, and that it should have been shown what the work and material furnished were worth according to the contract price. *Clark v. Scanlan*, 48
3. In an action brought to recover a sum claimed to be due for goods furnished and labor rendered, this court holds that a question involving the competency or admissibility of the testimony of the bookkeeper of plaintiff in relation to the contents of the bill left with the defendant, to produce which no notice had been given, can not primarily be raised herein. *Coughlin v. Gutta Percha & Rubber Mfg. Co.*, 71
4. In an action against an employer for the alleged trespass of his servants in entering a dwelling and removing personal property therefrom, this court holds as erroneous the action of the trial court in allowing the wife of plaintiff to testify as to the circumstances attending such removal, her husband being absent at the time. *Poppers v. Wagner*, 113

EVIDENCE. *Continued.*

5. In the case presented, the acts of the wrongdoers were not "matters of business transactions, where the transactions were had and conducted by such married woman as the agent of her husband," as laid down by the statute. *Id.*, 113

6. The grounds of the objection to evidence offered by way of impeachment should be specific. *Smith v. McCarthy*, 176

7. This court holds as incompetent and immaterial portions of a certain deposition introduced in evidence after the case presented was remanded to the trial court, and that the additional evidence, introduced at the second trial, did not materially change the facts as presented by the former record. *Chisholm v. Beaver Lake Lumber Co.*, 253

8. In the case presented, this court holds that the husband of the plaintiff was properly allowed to testify in her behalf. *Obermann Brewing Co. v. Ohlking*, 356

9. In the absence of a statutory provision, the rule is, that a deposition, given by a witness at a time when he was not disqualified, may be read in chancery, or on the trial at law of an issue out of chancery, if he acquires an interest in the suit after giving the same. *Trunkay v. Hedstrom*, 397

10. A stenographer's transcript of the evidence of a party plaintiff to a given suit, is inadmissible upon a subsequent trial thereof, the agent of the defendant with whom the contract in question was entered into having died in the meantime. *Id.*, 397

11. In an action for the recovery of damages, alleged to have arisen through the failure of defendants to deliver a quantity of coal, this court declines, there being no evidence tending to prove that the plaintiffs were ready to pay for the same, to interfere with the judgment against them. *Id.*, 397

12. In a contention involving the question as to which of several contracts was the true one, evidence tending to show the fact should be admitted by the court, and the question determined by the jury. *Hess v. Board of Education*, 440

13. Between merchants an account rendered and not objected to within a reasonable time becomes a settled account which is conclusive between them, unless fraud, mistake, omission or inaccuracy is shown. *Mackin v. O'Brien*, 474

14. The admission in evidence of accounts rendered, which have not been objected to within such time, without the production of the original entries or books from which they were taken, can not be complained of. *Id.*, 474

15. This court will not consider objections to the introduction of evidence primarily raised herein. *Id.*, 474

16. A contract under seal can not be varied by parol evidence. *Kinsley v. Charnley*, 553

17. The usual or reasonable value of professional services is a question of fact, and not of science, calling for a professional opinion. *Walker v. Cook*, 561

EVIDENCE. *Continued.*

18. In an action brought to recover an amount claimed to be due for the storage of a machine, this court holds, the contention of the defendant being that the rate of charges was inserted in the application for storage after he signed the same, that a bill sent to him covering such claim, and the letter written by him in reply thereto, were admissible in evidence in his behalf, and declines to interfere with the judgment in his favor. *Parry v. Arnold*, 622

EXECUTIONS.

1. The levy upon personal property of an attachment issued by one judicial authority to one officer, takes precedence of an execution against the same defendant issued by another judicial authority to another officer, although the execution was in the hands of the latter before the levy of the attachment. *Hanchett v. Ives*, 471

FACTORS—See BROKERS.

FEES—See COSTS.

1. Where a duty is imposed by law and compensation for its performance fixed by law, no greater compensation can be exacted or enforced. *Walker v. Cook*, 561
2. A witness having attended court in obedience to a subpoena, is not entitled to recover upon an agreement for compensation for such attendance, exceeding in amount the legal fees. *Id.*, 561

FRAUD.

1. A creditor who advises his debtor to purchase goods, with the object of deriving the benefit therefrom, is not liable to the seller if the debtor purchases with honest intent. *Gray v. Lindauer*, 371
2. Fraud is a good defense at law to an action upon a sealed instrument, if the fraud is such as shows that the party has been tricked into signing an instrument that he did not intend to execute, but the defendant can not show in an action at law that he was induced to sign by fraudulent representations as to collateral matters, or as to the nature and value of the consideration. *Johnson v. Wilson*, 639

FRAUDULENT CONVEYANCES.

1. A conveyance made by a husband, for the purpose of defrauding a wife, seeking a divorce, of alimony or maintenance, can not stand. *Scott v. Maglaughlin*, 162
2. Equity will not foreclose a trust deed given with such an end in view. *Id.*, 162

GAMING.

1. This court holds that the right to relief under Sec. 135 of the criminal code upon the ground that money for which decrees by default were entered in the trial court was lost in gaming, is not waived by the failure to set up the same as a defense in the first instance. *Patterson v. Scott*, 348

GARNISHMENT.

1. The answer of a garnishee must be taken as true in the absence of proof to the contrary. *Manowsky v. Conroy*, 141

GARNISHMENT. *Continued.*

2. The traverse of such answer by the execution creditor, does not relieve him of the duty of proving the same untrue. *Id.*, 141

3. Upon garnishment proceedings wherein it is sought to reach funds claimed to be due the judgment debtor, notice having been served upon the garnishee by sub-contractors under such debtors in conformity with the requirements of the lien law, to recover claims aggregating the balance due or more, this court declines to interfere with the verdict for the garnishee, for the reason that Sec. 2, Chap. 82, R. S., touching the appearance of claimants, and the litigation of their rights, was not complied with. *Id.*, 141

4. The answer of a garnishee, until contradicted or disproved, must be considered as true. If judgment is demanded upon the answer it must appear therefrom that the garnishee is chargeable, or he will be discharged. *C. & E. I. R. Co. v. Blagden*, 254

5. An employer may, after the service of the writ, properly pay the wages of a servant in advance, in order to prevent the same from being reached under garnishment proceedings. *Id.*, 254

6. Garnishment proceedings can only reach the debt which the judgment debtor could recover by action at law. *Sangamon Coal Mining Co. v. Richardson*, 277

7. Proceedings of this character will not lie on the part of the creditors of a corporation to recover the unpaid balance on shares of stock where the amount received as payment in full was much less than the face value thereof, until after the agreement to that end shall have been set aside by bill in equity. *Id.*, 277

8. A receiver may properly be appointed to take possession of and collect a note and mortgage in the hands of an attorney claiming a lien thereon for professional services rendered the reputed owner thereof, upon petition of a third person claiming to own the same. *Gary v. Brown*, 435

9. An order making such appointment in no wise disposes of the claims of creditors of the payee of such note. *Id.*, 435

10. In such case an order enjoining the claimant of the lien from prosecuting garnishment proceedings against the mortgagor and maker of the note in the State where the same were given can not be complained of. *Id.*, 435

GIFTS—See NEGOTIABLE INSTRUMENTS, 6.

GUARANTY—See ADMINISTRATION, 4; LANDLORD AND TENANT, 3, 4.

1. A vendee has no right to rely upon general words of praise on the part of the vendor. *Harris v. Brain*, 510

2. For the payment of money a contract to see it paid is, when another is to pay it, a guaranty. *Kinsley v. Charnley*, 553

3. Where there is a mere proposal by one to guarantee the performance of an undertaking by another if credit be extended to such others, the contract of guaranty is not complete till the credit is extended and notice given of the acceptance of the guaranty. *Ruffner v. Love*, 601

GUARANTY. *Continued.*

4. Such notice need not be given in writing, or be in any particular form, but may be inferred by the jury from facts and circumstances warranting the same. *Id.*, 601

5. In an action brought for the recovery of the price of certain goods alleged to have been sold third persons on the strength of a guaranty given by the defendant, this court holds that on account of the giving of an erroneous and misleading instruction the judgment for the plaintiff can not stand. *Id.*, 601

6. This court holds that a letter bespeaking the assistance of a bank president in behalf of a third person can not be construed as authorizing the purchase by said person of a bad debt from the bank in question, and guaranteeing payment therefor. *Beadle Co. Nat. Bank v. Hyman*, 618

HIGHWAYS—See TAXES, 2.

1. Highway commissioners are a *quasi* corporation, and suit by or against them should be brought in their official and not their individual names. *Lange v. Soffell*, 624

HUSBAND AND WIFE—See EVIDENCE, 4, 5, 8; FRAUDULENT CONVEYANCES, 1; PARTIES, 1.

1. In an action for the recovery of a sum claimed to be due for goods furnished for family consumption, this court holds that the trial court erred in refusing to give in behalf of the defendant certain instructions touching the necessity for a consideration to support a promise to pay, and the liability of a husband for debts contracted by his wife. *Gaffield v. Scott*, 317

2. It is a rule of law in the State of New York, that a decree of divorce obtained in another State against one who, at the time it was rendered and during the pendency of the proceeding was domiciled in New York, and who was not personally served with process, and did not appear in the action or proceedings, is wholly inoperative and void, so far as relates to the defendant in such divorce proceeding. *Simonds v. Allen*, 512

3. The presumption is, that a contract of marriage is to be performed in the place in which the parties to it are domiciled at the time the marriage is performed, and the capacity of each party to enter into a valid contract must be determined by the law of the place of the marriage. *Id.*, 512

4. A marriage, invalid at the place it was entered into, must be held invalid wherever the question of its validity is raised for determination. *Id.*, 512

5. Upon the introduction of the decisions of another State, showing the rule of law therein touching certain cases, it is proper for the court to determine the validity of a marriage contracted in that State by the law thereof. *Id.*, 512

6. Upon a bill filed praying that a marriage which had been performed in another State should be declared void, this court holds that the ceremony in question was a mere form, and that the trial court erred in dismissing said bill. *Id.*, 512

INJUNCTIONS—See CONSTITUTION, 1; GARNISHMENT, 10; PRACTICE, 7; TAXES, 1.

1. Upon a bill perpetually to enjoin the collection of a judgment for damages arising through the obstruction of a watercourse, the same being based upon the alleged perjury of certain witnesses, mistakes of others, and divers remarks and offers alleged to have been made by the plaintiff since the judgment, this court holds that the same should not be disturbed, the evidence in question having been presented and considered on the trial of the cause. *Guthrie v. Doud*, 68

2. Damages may be assessed upon a litigant's liability for attorney's fees on the dissolution of an injunction obtained against such person, and non-payment thereof on his part is no bar to a recovery. *Reich v. Berdee*, 186

3. In such case the damages allowed should only cover services rendered touching such dissolution. *Id.*, 186

4. Upon a bill to enjoin actions of trespass and ejectment for the encroachment upon the land of another through the erection of a building, the boundary line, which proved to be incorrect, having been agreed upon beforehand by both owners, this court modifies the decree in behalf of the plaintiff perpetually enjoining the prosecution of such actions, in so far as to have the same continue only so long as the building in question remains upon its present site. *Kernan v. Moore*, 229

5. This court declines to interfere with a decree in behalf of the complainant on a bill filed by him to enjoin the issuance of a tax deed to certain real estate, upon the ground that the town taxes for the year in question were not certified in the County Court, in conformity with the statute then in force. *Gage v. Nichols*, 365

INSOLVENCY—See JUDGMENTS AND DECREES, 2; PARTNERSHIP, 5, 6.

1. Upon a contention involving the winding up of an insolvent corporation, this court holds that certain notes were given by it to plaintiff and judgment confessed thereon upon an agreement that a creditor's bill for the benefit of all the creditors of the firm should be filed; that plaintiffs were not entitled to any preference over the other creditors of the firm, and that although it was error to dismiss the intervening petition of another creditor setting forth the facts above recited, the same was cured by the decree ordering a *pro rata* distribution of the assets in the receiver's hands. *Talcott v. Grant, Wire & Spring Co.*, 155

2. Upon an appeal from an order of the County Court touching the matter of the insolvency of a firm of wool factors this court holds, with reference to the claim for first lien by the Union Trust Company, upon certain wool, that the same can not be maintained in view of the fact that the amount of money claimed to have been advanced by it thereon and unpaid at the time of the hearing in said court is purely conjectural and incapable of being shown; that the assignment by two of three partners composing the insolvent firm, was inoperative to pass title to the property involved, until the same was ratified by the absent partner, his whereabouts not having been shown when the same was made, and that the interest of the two partners did not pass till then;

INSOLVENCY. *Continued.*

that the taking possession by a storage company of lofts leased by it from said insolvents by a ruse after the receiver of said firm had taken possession thereof, and before such ratification, can not be complained of; that such action sufficed to make its title complete against the assignors, assignee and general creditors to the extent of the advances of its receipt holders, which remained unpaid, and that certain receipt holders had no better standing as against the consignors of certain wool than the factors would have themselves. *Trumbull v. Union Trust Co.*, 319

3. The directors of an insolvent corporation may not apply the assets thereof to the payment of debts due themselves, to the exclusion of other creditors. *Roseboom v. Whittaker*, 442

4. A judgment by confession can not be looked upon as a constructive assignment, until some creditor has sought to have it so declared. *Id.*, 442

5. Liens accruing before such step has been taken are not displaced by it. *Id.*, 442

6. The County Court may properly order the payment of debts incurred under duly authorized contracts entered into by an assignee for the purpose of preserving the property involved, and rendering it available to the creditors. *Singer v. Leavitt*, 495

7. This court affirms an order of the County Court directing the payment of a certain balance claimed to be due the manager of a theatrical troupe who entered into a contract with the proprietor of a theatre to play therein a season of one week upon a certain guaranty, said contract having been assumed by the assignee of such proprietor, who subsequently made a voluntary assignment for the benefit of his creditors. *Id.*, 495

8. Upon petition of the indorsee of a note given by a corporation subsequently insolvent, that it might be permitted to share in the distribution of the estate, although its claim was not filed in apt time, this court holds that in view of the fact that the trial under review was under a stipulation that the assignee duly published a notice as required by law, the argument of petitioner that said notice was defective can not stand, and that the trial court erred in granting the relief as prayed. *Winona Paper Co. v. First Nat. Bank*, 630

INSTRUCTIONS—See GUARANTY, 5; HUSBAND AND WIFE, 1; MASTER AND SERVANT, 4; MUNICIPAL CORPORATIONS, 4; RAILROADS, 6, 14, 19.

1. In the case presented, it is *held*: That the fact that the court gave the jury an instruction, stating the correct rule of damages, upon request of the defendant, will not cure the error committed in giving an erroneous one in behalf of the plaintiff, there being no evidence in the record as to the true rule on which to base a verdict, and it being apparent that the erroneous rule was followed in arriving at the same. *Clark v. Scanlon*, 48

2. In an action to recover from a municipality for a personal injury alleged to have been occasioned by a defective street, this court holds as

INSTRUCTIONS. *Continued.*

erroneous an instruction given in behalf of plaintiff, the same containing no reference to the evidence, and setting forth in effect that a traveler upon the streets of a city need not exercise ordinary care. *City of Chicago v. Morse*, 61

3. In an action for damages for a personal injury the facts of care or negligence are questions for the jury, and they should not be instructed by the court as to what acts constitute either. *C. N. W. Ry. Co. v. Bouck*, 123

4. An instruction should be given, when the evidence justifies the argument to the jury that the facts supposed therein are true, and upon the assumption made the law is correctly stated and the proposition in question is contained in no instruction given. *Paruly v. Head*, 134

5. An instruction setting forth that damages may be assessed for the plaintiff's time while being cured, and for a permanent injury, if proved, is not seriously contradictory. *Smith v. McCarthy*, 176

6. Upon a contention involving the meaning of certain correspondence relating to the sale of a lot of damaged iron, this court holds that the instructions given in behalf of plaintiff touching the intention of the parties in interest were less favorable than they were entitled to, and that proper instructions as to damages were not given. *Hammond v. Cragin Mfg. Co.*, 216

7. An instruction, though correctly stating a proposition of law, should not be given, in the absence of evidence upon which it can be based. *Espen v. Roberts*, 268

8. The refusal of an instruction can not be complained of where a special finding of the jury specifically denies the hypothesis thereof. *C. & E. I. R. R. Co. v. Hines*, 271

9. An instruction assuming to set forth all the facts which warrant a recovery, but omitting one material element in the hypothesis, is bad. *Bittinger v. Druck*, 301

10. When the facts relied on by the plaintiff are necessarily antagonistic to and exclude those relied on by the defendant, the instructions for the plaintiff need only summarize all the elements in the cause essential to a recovery on his theory. *Id.*, 301

11. To instruct a jury as to the weight of affirmative and negative testimony is erroneous. *C. & N. W. Ry. Co. v. Trages*, 307

12. No complaint can be made of a refusal to give an instruction, where the substance thereof is contained in one given. *Daegling v. Illinois Vault Co.*, 341

13. An instruction setting forth that a street railway company has an absolute right of way over its track, against all foot passengers and vehicles, without regard to circumstances, should not be given. *Chicago West Division Ry. Co. v. Ingraham*, 351

14. In an action to recover from a railroad company damages for personal injuries alleged to have been occasioned through its negligence at a street crossing, this court holds as erroneous certain instructions given in behalf of the plaintiff, upon the ground that they stated no rule to govern the jury in assessing damages, and that the state-

INSTRUCTIONS. *Continued.*

ment repeated in each of them that the same must not exceed a certain sum, was improper, as being likely to influence a verdict therefor.

L. S. & M. S. Ry. Co. v. May, 366

15. The failure to mark an instruction not given "refused," amounts to the same thing as if so marked. *Clapp v. Martin*, 488

16. The giving of an erroneous instruction which did no harm can not be complained of. *Chicago City Ry. Co. v. Wilcox*, 450

17. An instruction, in the absence of evidence upon which it can be based, should not be given. *City of Chicago v. Coleman*, 557

18. It is proper for a trial court to give one connected charge in lieu of separate instructions asked by the parties, provided that such charge embraces all that the parties ask to which they are entitled. *Alexander v. Manderille*, 589

19. An instruction of this character which directs the attention of the jury away from the issue one of the parties has a right to present, is erroneous. *Id.*, 589

INSURANCE.

1. Where the contract in a mutual insurance certificate provides, that upon a death the corporation shall make an assessment and pay over the proceeds, not exceeding a certain amount, in an action thereon the declaration must charge a refusal or failure to make the assessment and allege that if the same had been made it would have resulted in the amount which the plaintiff claims as damages. *Ring v. U. S. Life & Accident Ass'n*, 168

2. In an action to recover upon an insurance certificate, the same agreeing that the amount named therein should be paid at the death of one of two persons named, to the survivor, this court holds that the demurrer to the declaration was improperly sustained. *Id.*, 168

3. The act of hunting does not amount to the occupation of hunting. *U. M. Accident Ass'n v. Frohard*, 178

4. A classification of hazards of an insurance company confined exclusively to occupations, does not cover isolated acts. *Id.*, 178

5. A policy of insurance must be construed liberally in favor of the assured. *Id.*, 178

6. The burden of proof is upon a mutual insurance company to show in case of loss that an assessment would not realize the amount at risk. The presumption is to the contrary. *Id.*, 178

7. It is proper to require payment in full where a company refuses to levy an assessment upon the untenable ground that it is liable only for a portion of the sum named. *Id.*, 178

8. That portion of a decree directing payment by the officers of such company, no officer thereof being a party to the suit, is nugatory and can not be complained of. *Id.*, 178

9. The naming of an "affianced wife" as the beneficiary in a certificate of a mutual benefit association, she remaining such until the death of the assured, does not operate to make her a dependent within the rules thereof. *Parke v. Welch*, 188

10. The designation as a beneficiary of a person not included within the class to be benefited under the rules of such association, does not

INSURANCE. *Continued.*

relieve it from payment to the proper person or persons of the amount involved. *Id.*, 188

11. If a part of the time allowed under the conditions of an insurance policy for the bringing of suit upon a loss, is consumed in negotiations touching a settlement, the time so occupied should be added to the period specified therein. *Allemania Ins. Co. v. Peck*, 548

12. In an action brought to recover upon an insurance policy, the company contending that it was not liable because of the breach of one of its conditions touching the title to the property covered, this court holds, that a policy upon farm stock and implements, covers the property on hand at the place mentioned when a fire occurs, even though no one of the identical articles destroyed were there when the policy issued, and that the sale or incumbrance of any such property covered, avoids the policy only as to the specific articles themselves. *Dwelling House Ins. Co. v. Butterly*, 626

INTEREST—See MUNICIPAL CORPORATIONS, 3.

1. Interest may be collected upon a balance ascertained to be due on a liquidation of accounts. *Coughlin v. Gutta Percha & Rubber Mfg. Co.*, 71

JUDGMENTS AND DECREES—See INJUNCTIONS, 1; INSURANCE, 8; LANDLORD AND TENANT, 1; MECHANICS' LIENS, 6, 8; MORTGAGES, 14; PRACTICE, 10, 11; PRACTICE, 36.

1. A decree in a given cause governs only the parties thereto. *Folz v. Nelke*, 370

2. Upon a writ of error brought to reverse a decree of the Circuit Court rendered on an appeal from the County Court upon a petition filed in voluntary assignment proceedings, to declare void the alleged lien of executions issued upon judgments by confession in favor of the defendants, and against said insolvent, as against her property in the hands of her assignee, and to postpone and preclude said defendants from receiving any dividend out of said property until *bona fide* creditors should be paid, this court holds that the entering up of said judgments by confession, the levying of the executions on said property, and the making of the voluntary assignment by the insolvent were all part and parcel of one transaction by which she divested herself and intended to divest herself of all dominion over her property; that defendants should be paid *pro rata* with the other creditors, the amounts due them, and that no costs be recovered by either party from the other, but each to pay their own. *Prouty v. Hanford*, 517

JURISDICTION.

1. A court, or receiver appointed by it, upon bill filed by certain stockholders of a corporation praying, among other things, for the dissolution thereof, its directors alone being named as defendants therein, acquires no control over the stockholders. *Robinson v. Raulston*, 166

2. This court dismisses for want of jurisdiction an appeal from an order dissolving an injunction, it being sought to restrain the payment of public funds to defendant on the ground of its being a sectarian

JURISDICTION. *Continued.*

institution under church control. *Stevens v. St. Mary's Training School*, 237

3. Appeals in such cases are granted only to the Supreme Court. *Id.*, 237

4. Questions involving the construction of the constitution without involving the validity of a statute, are within the concurrent jurisdiction of the Supreme and Appellate Courts. *McCoy v. City of Chicago*, 576

LANDLORD AND TENANT.

1. Upon motion to set aside judgment by confession for rent due and unpaid, it is *held*: That the warrant of attorney was not defective for failing to name any particular attorney; that the claims for unliquidated damages urged as a set-off, should not be considered, not being in any wise connected with the demand for rent, and that the fact that the judgment was entered by the clerk in term time, would justify the issuance of an execution before the record of the judgment was complete. *Poppers v. Meager*, 19

2. Upon a contention as to whether a landlord, in a proceeding on a distress warrant, where the property seized had been released on a forthcoming bond, was entitled to recover the expense of the custody of the goods levied upon before they were so released, this court holds that the same method of defraying expenses of this character should be pursued in cases of distress, as in attachment; that the jury are not authorized to tax such costs, but that such allowances should be ascertained by the court, and that no injury has been done the defendant, by reason of the finding of the jury upon this point, the same having been accepted by the court as reasonable and proper. *Poppers v. Meager*, 20

3. The entering into a written guaranty, upon a lease for the payment of the rent provided for therein, amounts to an admission of the due execution thereof. *Obermann Brewing Co. v. Ohlerking*, 26

4. The liability of a guarantor is in no wise affected by the failure of the lessor to give notice of the lessee's default. *Id.*, 26

5. While it is erroneous in such action to allow the recovery of attorney's fees and costs in entering judgment against the lessee, no complaint can be made thereof, where the record shows that no objection was made or exception taken, when the evidence touching the same was introduced, and that the attention of the court was in no manner called to the excessive verdict when a motion for a new trial was overruled. *Id.*, 26

6. In an action of debt for the recovery of rent, this court holds that the intention of the parties to the lease was for the payment of rent monthly in advance, and that the fact that the amount of each installment was uncertain through failure of appraisers to agree in accordance with a clause therein, was no defense to the claim for interest upon each monthly sum found to be the reasonable rental value of the premises in question. *Heissler v. Stose*, 39

LANDLORD AND TENANT. *Continued.*

7. Rent in advance can not be recovered in the absence of an agreement to that effect. *Id.*, 39

8. In an action of debt upon a bond executed on an appeal taken from a judgment in behalf of plaintiff in an action of forcible detainer, a condition thereof being that certain rent then or to be due should be paid in case the judgment was affirmed or the appeal dismissed, this court holds that evidence as to the rental value of the premises in question was admissible notwithstanding the absence from the declaration of an averment of detention by defendant, the same being supplied by the plea of payment on his part, the evidence showing his possession at the time in question. *Barrett v. Lingle*, 91

9. The failure by a tenant to comply with a condition in a lease prohibiting the assignment thereof without the consent of the lessor, can only be complained of by the latter. *Chicago Attachment Co. v. Davis S. M. Co.*, 362

10. In an action for the recovery of a balance alleged to be due for rent under a lease assigned by parol agreement, this court declines, in view of the evidence, to interfere with the judgment in behalf of the plaintiff. *Id.*, 362

11. The term property means that which is susceptible of present possession or enjoyment; that which is to be acquired is not property. *Borden v. Croak*, 389

12. A condition in a lease, providing that the lessor shall have a valid and first lien upon the property of the lessor for rent, refers to property owned at the time of the making thereof. To reach subsequently acquired property the instrument must identify the same; failing to do so, it is void for uncertainty. *Id.*, 389

13. The rent of a house occupied as a residence is a family expense within the meaning of Sec. 15, Chap. 68, R. S. *Illingworth v. Burley*, 394

14. In an action brought for the recovery of rent, the defendant has the right under the general issue to show payment, accord and satisfaction, and with few exceptions, any other matter which wholly or partly extinguished the cause of action. *Hubbard v. McCormick*, 486

15. In an action brought by a tenant against his landlord for the recovery of damages for injury suffered through the overflowing of a tank, caused by the negligence of the employes of a plumber engaged in making certain repairs in the building in question, this court holds, that the said plumber was not an independent contractor, and declines to interfere with a judgment in behalf of the plaintiff. *Bernauer v. Hartman Steel Co.*, 491

16. A landlord does not insure that nothing exists touching the premises in question that will interfere with the health or comfort of his tenant, nor is he bound to repair unless the lease so provides. *McCoull v. Herzberg*, 542

17. The law does not imply a contract on the part of a landlord that premises demised are tenantable or that they will continue to be so during the term. *Id.*, 542

LANDLORD AND TENANT. *Continued.*

18. An action at law to recover rent covenanted to be paid by lease under seal, can not be met by the defense that the lessee was induced to execute the lease by fraudulent representations as to the character or surroundings of the premises. *Id.*, 542

LICENSES—See BROKERS, 5.

LIENS—See INSOLVENCY, 2, 5; LANDLORD AND TENANT, 12.

LIFE INSURANCE—See INSURANCE.

LIMITATIONS—See CONTEMPT, 3; MORTGAGES, 2, 4.

LIQUIDATION.

1. The term "liquidation" does not necessarily imply mutual accounts. *Coughlin v. Gutta Percha & Rubber Mfg. Co.*, 71

MALICIOUS PROSECUTION.

1. It is proper in an action for malicious prosecution to admit evidence of damage suffered after the bringing of suit and before the trial thereof. *Schmidt v. Hughes*, 65
2. No recovery can be had in an action for malicious prosecution against several defendants, where one of them only is found guilty. *Rosenberg v. Hart*, 262
3. Nor where the prosecution did not terminate in an acquittal. *Id.*, 262
4. Nor where the same comes to an end through a compromise between the parties. *Id.*, 262

MASTER AND SERVANT—See PERSONAL INJURIES.

1. A servant who in ignorance of the danger obeys an order given by a superior servant who is aware that almost certain death will result from compliance therewith, is entitled to damages for injuries suffered thereby. *Stearns v. Reidy*, 246
2. In an action by a servant for the recovery of damages for injuries suffered through obeying the orders of a superior servant, this court holds that the defendant can not rely upon a variance between the pleadings and the proof, which but for his opposition would have been removed. *Id.*, 246
3. In the case presented, this court sustains a judgment in behalf of the plaintiff for \$9,000 for injuries received by him in an explosion in a stone quarry, the same resulting in total blindness. *Id.*, 246
4. In an action by a servant for the recovery of damages for personal injuries alleged to have been occasioned through obeying the orders of a superior servant, this court holds that the general instruction, given in lieu of those requested, properly and fully stated the law governing the case, and that the evidence, though conflicting, sustains the verdict for the plaintiff. *Hinckley v. Horazdovsky*, 259
5. A wilful neglect of means to save the lives and limbs of servants performing dangerous service from needless peril, constitutes gross negligence. *C. & E. I. R. R. Co. v. Hines*, 271
6. Where a given employment continues with no radical alteration in the character of the services rendered, the original contract fixes the rate of wages to be paid. *Ingalls v. Allen*, 458

MASTER AND SERVANT. *Continued.*

7. In an action brought by a servant to recover from his employer for injuries alleged to have been suffered through his negligence, this court holds, that the risks attending the use of the machine in question were obvious and assumed by the servant as incident to his employment, and that failure to guard the treadle in question did not constitute negligence on the part of the defendant. *Kolb v. Chicago Stamping Co.*, 488

8. Evidence in such case that other boys had been injured by similar machines in the same shop, should not be considered. *Id.*, 488

9. The rule touching the non-liability of a master for the negligence of an independent contractor in his employ, is not affected by the fact that the contractor is paid the cost of the work and a given per cent instead of a fixed price. *Alexander v. Mandeville*, 589

10. If it appears in evidence in an action brought for the recovery of damages for an injury alleged to have been occasioned through the negligence of servants of the defendant, that several sets of men were engaged upon the premises in question when the accident occurred, and it is left to the jury to infer the cause of the injury, the fact being that for one set of the men, the defendant was in no wise answerable, he is entitled to an instruction setting forth such fact. *Id.*, 589

11. In such case, a contractor should narrate what happened in the making of his contract, and the conduct of the work, from which the jury must infer whether he acted independently of his employer or not. *Id.*, 589

12. It is the duty of an employe receiving salary and expenses to keep and preserve true and correct statements of account. *Wolf Co. v. Salem*, 614

13. The right to an itemized account of expenses may be waived by the principal, either by express agreement or by the acceptance of faulty statements in lieu thereof. *Id.*, 614

14. The rule that a traveling salesman shall preserve vouchers for expenditures in way of expenses must be construed in a reasonable manner. *Id.*, 614

MECHANIC'S LIENS—See GARNISHMENT, 3.

1. Upon a petition for a mechanic's lien this court holds that the labor and material of plaintiffs went into the building in question; that the person in whom was vested the title thereof, held the same in trust for the defendant company; that although no time was fixed for the completion of the work, the statute was satisfied by its being done within one year, and declines to interfere with a decree for the plaintiffs. *Lehman v. Clark*, 83

2. The first and second sections of the Lien law, Chap. 82 R. S., give a lien in all cases for work or material furnished at the instance of the owner of any interest in land for anything which, by being furnished for that purpose and attached to the premises, becomes the property of such owner as part of his interest in the land. *Portones v. Holmes*, 812

MECHANIC'S LIENS. *Continued.*

3. Petitions for mechanics' liens must truly describe the contract entered into, what was done under it, and if no time was fixed by it for the performance the law will imply it to be a reasonable time, and in the latter case, if performance is complete within a year, the lien attaches. *Id.*, 312

4. It is not necessary by express words to negative Sec. 3 of the Lien law, which sets forth the exceptional cases in which no lien can exist, but only by affirmative description of the contract so far as it was express; and if the acts done in the performance of it show what the whole case is, and if so shown nothing repugnant to the provisions of such section appear, a lien exists. *Id.*, 312

5. Upon a petition filed for a mechanic's lien, this court holds that the complaint of the defendants that the *cestui que trust* under a trust deed was not made a party defendant should not be considered, upon the ground that the error, if any, does not affect him; that the contention that certain intervening petitions do not specify when work was done and material furnished is not supported by the evidence; that the fact that the decree of sale is several as to the petitioners in the several petitions, cures the omission of one of two pieces of land from the original petition, but included in the intervening petitions, in so far as to warrant the participation of the original petitioners in the proceeds of the sale decreed in behalf of the intervening petitioners, and that the defendant's exceptions, save one, and his objections to the master's report, can not be considered for want of certainty. *Id.*, 312

6. Upon a bill filed by sub-contractors for a mechanic's lien, this court holds that the same was properly dismissed for the reason that the statutory notice was not served upon the owner of the building in question, within the time required by Sec. 21, Chap. 82, R. S. *O'Brien v. Graham*, 546

7. No personal decree is authorized by the statute when there is a failure in the effort to establish a lien. *Id.*, 546

8. The mere fact that money which, according to the contract, is to be paid as fast as a given work progresses, is not paid by the owner, when by the terms of the contract it ought to be, will not authorize the abandonment of the work and the recovery of a mechanic's lien for the work performed by the contractor, unless the payments are made conditions precedent to the performance of the work, by the express and positive provisions of the contract. *Geary v. Bangs*, 582

9. In order to obtain a lien the contractor must show that he has performed his contract, or that he has been prevented from so doing by the act of the other party. *Id.*, 582

10. The failure to pay an installment when due is not such an act or omission as will prevent the contractor from completing his contract. *Id.*, 582

11. A decree awarding a mechanic's lien having been previously considered herein, the same having been reversed and the cause remanded, after which complainant amended his bill, alleging among other things

MECHANIC'S LIENS. *Continued.*

that the architect had fraudulently and without cause, refused to deliver to him certain certificates calling for amounts due and unpaid, this court holds that such view is not supported by the evidence, and declines to interfere with the decree in behalf of the defendants.

Michaelis v. Wolf,

645

MISTAKE—See SETTLEMENT. 1.**MORTGAGES—See FRAUDULENT CONVEYANCES. 2.**

1. Upon an order directing the issuance of a writ of assistance in behalf of the grantee in a master's deed of real property sold under foreclosure proceedings, said grantee being the assignee of the certificate of sale, it being contended that the reversal of the decree of sale by this court subsequent to the execution and delivery of such deed operated to divest the title acquired thereby, and that for such reason there was no foundation for the issuance of the writ, it is *held*: That the order was properly issued, the facts being that the grantee in the deed was a stranger to the decree, and that the reversal was for an error only, of which the purchaser was not obliged to take notice.

Lambert v. Hyers,

43

2. There can be no foreclosure of a mortgage where original proceedings to that end were dismissed for want of prosecution, and the mortgage note is barred by the statute when the new bill is filed.

Merritt v. Merritt,

63

3. The makers of a mortgage are estopped from denying the indebtedness set forth therein. *Brokaw v. Field,*

138

4. The recitals in a mortgage setting forth the existence of a debt, accompanied by an agreement to pay the same, are "evidences of indebtedness" in writing within Sec. 16 of the act concerning limitations. *Id.,*

138

5. Where, under the terms of a mortgage, the whole debt does not become due by default in the payment of interest, and proceedings to sell under such default are begun, a tender of the sum due, with interest and expenses, will be sufficient ground for bringing the same to an end.

Id.,

138

6. In the case presented, this court holds that both the legal and equitable estates were conveyed by the mortgage given, and that the debt of the husband was a valid consideration for the giving thereof.

Id.,

138

7. The burden of proving the discharge of property standing in the relation of surety, by an extension of the time of payment of a debt, is upon the person contending the same was made. *Id.,*

138

8. A formal deed is not required for the release of an equity of redemption when the mortgage is made in the form of an absolute conveyance. *Scanlan v. Scanlan,*

202

9. If in such case subsequent transactions between the mortgagor and mortgagee make it inequitable to allow redemption, equity will refuse its aid. *Id.,*

202

10. This court declines to interfere with a decree of foreclosure of a chattel mortgage, and holds that the property alleged to have been

MORTGAGES. Continued.

taken away by the mortgagee was not identical with the property named therein; that at the time of such taking the mortgagor acknowledged that the same was not covered by the mortgage, and that by arrangement with the mortgagee, and on his credit, other property of like description was procured by the mortgagor to take its place. *Kramer v. Imhoff*, 250

11. Upon a bill to foreclose a mortgage this court declines to interfere with the finding of the trial court that the son of the mortgagee had received payment in part on account of the same, and that he was authorized so to do. *Holden v. Terhune*, 269

12. In equity, where a tender is made by a mortgagor of the amount due after default in the payment, the same must be kept good in order to discharge the mortgage. *Blain v. Foster*, 297

13. At law, such tender does not operate to revest the title in the mortgagor so as to enable him to recover. The mortgagee is not bound to receive the amount due and restore the property. *Id.*, 297

14. This court holds as erroneous a judgment in behalf of the plaintiff in an action of trover brought to recover the value of certain property alleged to have been converted by the defendants to their own use, upon the ground that the same included the value of property mortgaged, they, as mortgagees, being rightfully in possession thereof under the terms of the instrument. *Id.*, 297

15. When a mortgagor has conveyed the mortgaged premises to the mortgagee it only operates as a bar to the equity of redemption, where it clearly and unequivocally appears that both parties so understood and intended it should. *Kirchoff v. U. Mut. Life Ins. Co.*, 607

16. When by the operation of law upon the facts, or by the agreement of the parties, a mortgage debt has been apportioned, and a part of it made the sole burden upon a part of the incumbered property, that part may be redeemed by paying the portion of the debt apportioned thereto. *Id.*, 607

17. Upon a bill filed to redeem certain property to which defendant acquired the legal title under a quit-claim deed from complainant and her husband, and under certain foreclosure proceedings under a trust deed, to which complainant was a defendant, instituted prior to said quit-claim deed, and carried to decree and sale subsequent thereto, it being contended by said complainant that her offer to release and quit claim to the defendant all her lands in said trust deed described, providing she might be allowed to redeem two lots included therein upon terms named, was agreed to by it, this court holds that said complainant is entitled to the benefit of such agreement, and that, upon the ascertainment of the amount due and the payment thereof within a time named, a conveyance to her of the premises in question must be made. *Id.*, 607

MUNICIPAL CORPORATIONS—See PERSONAL INJURIES, 10.

1. In an action brought against a municipality for the recovery of damages for an injury to private property, occasioned through raising

MUNICIPAL CORPORATIONS. *Continued.*

the grade of one of its streets, the burden of proof is upon the plaintiff to show that the injurious act was committed while he was owner of the premises injured. *City of Chicago v. Altgeld.* 23

2. In the case presented, this court holds that the conduct of the plaintiff with reference to the institution of suit, and the trial thereof, was open, fair and honorable in every respect. *Id.*, 23

3. In an action to recover from a municipal corporation the value of land appropriated by it for street purposes, it appearing that possession thereof was taken by the city six months before the institution of proceedings to condemn the same, the ordinance, which authorized such condemnation, providing that the costs of the proposed improvement should be paid for by special assessment upon property benefited to the amount the same could be legally assessed, the balance to be paid by general taxation, this court holds that, although the city has been unable to collect the special assessment levied, the deficiency must be made up from the general fund, and that interest is recoverable upon the value of the land from the time the city took possession thereof. *City of Chicago v. Smythe,* 28

4. In an action against a municipal corporation, to recover damages for obstructing the flow of surface water by raising the grade of a street, this court holds that a harmless, erroneous instruction touching the measure of damages can not be complained of, and declines to interfere with a verdict for the plaintiff. *Town of Lake v. Bok,* 45

5. Where a municipality retains a person as commissioner to make a special assessment, the necessary preparatory work which he may do before taking the oath of office, is a part of the service for which he should be paid, and he is likewise entitled to compensation for services rendered before his appointment, if the same were performed at the request of the municipal authorities. *Village of La Grange v. Benz,* 56

6. A municipality may regulate by ordinance the rate of speed of railway trains within its limits. *City of Lake View v. Tate,* 78

7. Ordinances of this character must be reasonable and consistent with the laws and policy of the State, and must not be oppressive, unequal, or unjust, partial or discriminating in their operation. *Id.*, 78

8. The question of whether an ordinance is a just and reasonable exercise of the power reposed in the common council is a question of law for the court, upon consideration of the circumstances of a given case. *Id.*, 78

9. In an action to recover a penalty from an engineer for running a train through a municipality at a greater rate of speed than was allowable under one of its ordinances, this court holds that the ordinance in question in attempting to divide the city into two railroad districts, one for each of two roads, and to establish a lower rate of speed for one road than the other, was obnoxious to the objection that it attempted unjustly and oppressively to discriminate against such road, and declines to interfere with judgment for the defendant. *Id.*, 78

MUNICIPAL CORPORATIONS. *Continued.*

10. The city council of the city of Chicago has no power to regulate or prohibit parades or processions as such. *Trotter v. City of Chicago.* 206
11. Parades or processions through streets are not nuisances. *Id.* 206
12. A city council having the power to prohibit or regulate, must exercise the same by ordinance, and can not delegate it to the discretion of the chief of police. *Id.* 206
13. The right of the "Salvation Army" to parade is equal to that of any other organization. *Id.* 206
14. An ordinance which operates partially is void. *Id.* 206

NAMES.

1. The abbreviation "Mrs." is not a name. *Schmidt v. Thomas.* 109

NEGLIGENCE—See AGENCY, 8, 9, 10; MASTER AND SERVANT, 5, 9; RAILROADS, 2, 17.

1. Whether a certain course of conduct is negligence is for the jury. *City of Chicago v. Morse,* 61
2. The conduct of a man, drunk or sober, at the time of a given transaction, is the subject of investigation, and if it was characterized by a proper degree of care and prudence, whether he made more or less effort to pursue that line of conduct, is immaterial. *C. & N. W. Ry. Co. v. Drake,* 114
3. No repetition by courts of review, that certain evidence does or does not sustain the verdict finding care or negligence in the particular case, make the conclusions of fact arrived at by such courts and the language in which they express such conclusions, doctrines of law for other cases. *C. & N. W. Ry. Co. v. Bouck,* 123
4. Negligence is a question of fact for the jury. *C. & N. W. Ry. Co. v. Traves,* 307
5. It is negligence to attempt to board a street car while in rapid motion. *Chicago City Ry. Co. v. Delcourt.* 430
6. Personal negligence is not to be imputed to a child six years old. *Chicago City Ry. Co. v. Wilcox,* 450

NEGOTIABLE INSTRUMENTS.

1. An erroneous interpretation of the terms of a due bill by its maker is no defense to an action thereon. *Obermann Brewing Co. v. Gurney,* 58
2. In an action against the guarantor of a promissory note, the consideration thereof being certain wire involved in another suit, lately decided herein, this court declines to interfere with judgment for the defendant. *Callender Insulating & Waterproofing Co. v. Badger,* 90
3. This court holds a certain instrument calling for the payment of money to an advertising company, to be a promissory note, in so far as to enable an assignee, taking the same for value before the time for the consideration to commence had arrived, and with no notice that the consideration was likely to fail, to recover thereon. *Seigel v. Chicago Trust & Savings Bank,* 225

NEGOTIABLE INSTRUMENTS. *Continued.*

4. The filing of a new declaration in the name of the person to whom a note was indorsed, together with his substitution as party plaintiff after the institution of suit thereon in the name of the indorser, will not warrant a judgment in behalf of the indorsee. *Rothschild v. Bruschke*, 282

5. The holder of a note duly indorsed, is legally presumed to be the owner thereof. *Breier v. Weier*, 386

6. In an action involving the question as to whether a certain note was delivered by a mother to her son as a gift *in presenti*, this court in view of the evidence, declines to interfere with a decree in the affirmative. *Id.*, 386

7. Notes accepted by children after attaining their majority, from their mother, the same covering their shares of their father's estate, in the absence of evidence going to show that they were not given with honest intent, will be considered as being based upon a sufficient consideration. *Proulx v. Hanford*, 517

8. In an action brought to recover upon certain promissory notes, the plaintiffs offering to remit all over and above a sum named, if it was held that the defense of usury was made out, this court holds that the plaintiff is entitled to a judgment for the sum named. *Willette v. Wheeler*, 629

NEW TRIAL—See PERSONAL INJURIES, 12.

1. In an action to recover the amount of a check this court declines to interfere with the judgment for the plaintiff, and holds that the trial court properly declined to grant a new trial upon the ground of newly discovered evidence, it appearing that the same is inconclusive and cumulative, and that the reasons adduced for its non-production upon trial are of an unsatisfactory nature. *First Nat. Bk. of Chicago v. Wm. Ruehl Brewing Co.*, 121

2. Evidence which is merely cumulative but not conclusive, will not justify a new trial upon the ground of newly discovered evidence. *C. R. I. & P. Ry. Co. v. Clough*, 129

3. An alleged erroneous allowance of interest in the computation of damages in a given case, will not be considered by this court, where the motion for new trial contains no suggestion thereof. *Memory v. Niepert*, 131

NUISANCES—See MUNICIPAL CORPORATIONS, 11.

PARENT AND CHILD.

1. In proceedings brought by grandparents for the adoption of a minor grandchild, its mother, the daughter of petitioners, having received its custody upon being granted a divorce from its father, she consenting to such adoption, this court declines to interfere with a decree in conformity with the prayer of the petition. *Baker v. Strahorn*, 59

2. The welfare of the child is of prime importance in such proceedings, and caprice, obstinacy or opposition, prompted by unworthy motives on the part of the non-consenting parent should not be regarded. *Id.*, 59

PARTIES—See HIGHWAYS, 1; REAL PROPERTY, 10, 11, 12.

1. Joinder of husband and wife in an action of trover for property belonging to the wife alone, is improper. *Harris v. Brain*, 510
2. It seems that the owner of real property can not, subsequent to a conveyance thereof, maintain a bill to remove a cloud from the title, even if he warranted the same. *Johnson v. McChesney*, 526
3. Upon a bill filed to procure a rescission of a contract, and the return of certain mining stock delivered in pursuance of a contract entered into for the purpose of developing a mine, it being contended by the complainant among other things that one of the two joint promisors therein had failed to prosecute such development, this court holds that both should have been made parties defendant to such bill; that the one not named does not become a party by being called as a witness in behalf of the complainant; that said contract can not be made several by averments in the bill, or by evidence of conversations between the parties, and declines to interfere with a decree dismissing the same. *Smith v. Hawkes*, 585

PARTNERSHIP—See INSOLVENCY, 2.

1. The acts or words of one of several partners touching property of his firm, is as to third persons in good faith acting thereon, the same as if done or said by all. *Wanner v. Winter*, 149
2. Where wilful acts or words of one partner, of which the rest of the firm are ignorant, result in injury to another, there can be no verdict for separate or different amounts against the individual members of the firm. *Id.*, 149
3. This court holds that the solicitor of certain co-partners was duly authorized by them to act according to his best judgment, touching proceedings instituted for the dissolution of the firm of which they were members. *Jacobs v. Kastholm*, 164
4. In proceedings touching the dissolution of a co-partnership, this court holds that the exceptions of the parties to the suit to the master's report were bad for uncertainty, and declines to interfere with his finding that a sum named was due the complainant. *Huling v. Farrell*, 233
5. An assignment should not be made by less than the full number of the members of a given firm in the absence of the rest, and without their consent, unless a crisis has arrived in its affairs, and the absent partners can not be consulted personally or otherwise in time to meet or avoid the same. *Trumbull v. Union Trust Co.*, 319
6. Subsequent ratification by such absent partners does not operate to divest the rights of purchasers and lien-holders acquired in good faith after the execution of the first instrument, and before such ratification. *Id.*, 319
7. If there be a dissolution of a partnership, and the remaining partner takes all the assets, and agrees with the outgoing partner to pay all the debts, the partnership debts have no preference over the individual debts of the remaining partner in the disposition of the assets which before the dissolution, were the assets of the partnership. *Prouty v. Hanford*, 517

PARTNERSHIP. *Continued.*

8. The purpose of requiring a certificate of the amount of capital, contributed by a special partner, is to enable those who may deal with the firm to estimate the credit that may be prudently extended to it, and it is strictly just that they shall be able to make such estimate with the greatest possible accuracy. *Wilson v. Bean*, 529

9. The certificate of a special partner which sets forth that he contributed goods to the value of a certain amount, the fact being that an indebtedness was paid him by the firm during the continuance thereof, must be looked upon as sufficiently misleading and deceptive to render its maker liable as a general partner to creditors of the firm. *Id.*, 529

10. Articles intended for the use of one of several partners may be purchased in the firm's name, if so purchased with the consent of all the partners, and when such articles are purchased and are charged to the partnership account, the debt will not be changed from a joint debt of all the partners to a several debt of the one who used the chattels by the refusal of the other partners to treat the debt as a firm debt. *Leihy v. Briggs*, 534

11. If one of several partners promises a creditor of the firm of which he is a member to assume and pay his entire debt, and the creditor agrees to look to him alone, a substitution of debtor is affected and the other partner is released. *Id.*, 534

12. In an action to recover the price of a phaeton and other property sold to a certain firm, it being contended by the plaintiff that because they were purchased for the defendant's wife the price thereof could not become a firm debt, this court holds, that in view of the agreement entered into by the members thereof to settle differences existing between them, that the other partner should assume all indebtedness of the partnership, and of the fact that he was accepted as debtor by the plaintiff, operated to release the defendant from all liability upon such claim. *Id.*, 534

PAYMENT—See DURESS, 1.

PENALTIES—See DAMAGES, 1.

PERJURY—See CONTEMPT, 2.

PERSONAL INJURIES—See CARRIERS, 1; INSTRUCTIONS, 2, 3 5, 14; MASTER AND SERVANT; RAILROADS.

1. In an action against the owner of a building for damages for a personal injury alleged to have been occasioned by the employment of an incompetent servant and the use of an unsafe elevator, this court declines to interfere with a verdict for the plaintiff. *Hodges v. Percival*, 25

2. One suffering from a personal injury caused by the negligence of another is entitled to damages up to the time of trial should the effects thereof continue so long, and thereafter, when the same are "imminent and sufficiently certain." *Chicago City Ry. Co. v. Yancey*, 94

3. In an action to recover for personal injuries suffered by an employe through the negligence of a superior servant whose orders he was bound to obey, this court declines, there being no error of law in the case, to disturb the verdict in behalf of the plaintiff. *Fraser v. Hand*, 153

PERSONAL INJURIES. *Continued.*

4. In an action by an administrator to recover for the death of his intestate, the same being alleged to have been occasioned through the negligence of his employers, this court declines, in view of the evidence, to interfere with the verdict in behalf of the plaintiff. *Middleton Co. v. Roycroft*, 381

5. In an action against a street railway company to recover damages for injuries received by the plaintiff while attempting to board a car, this court reverses a judgment for the plaintiff as contrary to the weight of evidence. *Chicago City Ry. Co. v. Delcourt*, 430

6. A child can not be cut off from compensation for personal injuries suffered through the negligence of another, for the reason that its mother failed to perform her full duty in protecting it from harm. *Chicago City Ry. Co. v. Wilcox*, 450

7. The rule may be otherwise where the suit is for the benefit of the next of kin. *Id.*, 459

8. This court declines to interfere with a verdict in the sum of \$15,000 in behalf of a child and against a street railway company for the loss of a leg and other injuries suffered through its negligence. *Id.* 450

9. In an action brought by a passenger upon a street car to recover for injuries suffered through being pushed therefrom by the conductor thereof, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Chicago City Ry. Co. v. Pelletier*, 455

10. In an action against a municipality for the recovery of damages for injuries suffered through a defective sidewalk, this court holds that there was no material variance between the plaintiff's proof and the allegations set forth in her declaration, and declines to interfere with the verdict in her behalf. *City of Chicago v. Chase*, 551

11. Damages in the sum of \$2,000 for the breaking of a leg of a woman, sixty-six years of age, held to be reasonable in the case presented. *Id.*, 551

12. In an action brought for the recovery of damages from a municipality, for injuries suffered through a defective sidewalk, this court holds that in view of the evidence the verdict for the plaintiff in the sum of \$4,000 was excessive, and that the trial court erred in refusing to grant the defendant's motion for a new trial for that reason. *City of Chicago v. Colman*, 557

13. In actions of this character the burden of proof is upon the plaintiff, to show not only such circumstances as make the municipality answerable for the injury sustained, but also the character and extent thereof. *Id.*, 557

PLEADING—See PRACTICE, 16.

1. The allegation necessary in a pleading is to be determined from the language of the contract on which the rights of the parties depend. *Ring v. U. S. Life and Accident Ass'n*, 168

2. In pleading at law, every traversable allegation which is not traversed is admitted. *Williams v. Boyden*, 477

PLEADING. *Continued.*

3. An issue settled by the pleadings in a given case must be taken as conclusive. *Id.*, 477

4. In an action against the sureties upon a replevin bond, it being alleged that the defendants in the suits had judgment for return of the goods in question, and that the same had not been returned, this court holds that the introduction therein of the record of a judgment in the replevin suit from which it did not appear that a judgment for return had been rendered, would not estop a recovery, for the reason that the averment in the declaration of a judgment of return not having been traversed, the same was admitted, and no proof in support thereof was required. *Id.*, 477

POWER OF ATTORNEY—See LANDLORD AND TENANT.

PRACTICE—See APPEAL AND ERROR; EVIDENCE, 15; NEW TRIAL, 2.

1. This court declines to consider an action to recover from a railroad company for injury to a horse during transit, for the reason that the abstract does not contain the substance of those parts of the record upon which error is assigned, as required by rule twenty-one. *C. & G. T. Ry. Co. v. Crolie*, 17

2. The rule requiring exceptions to be taken to the rulings of trial courts in order to present them for review in this court is as strictly applicable to municipal corporations as to natural persons, and it is like wise applicable in cases where the liberty of the citizen is involved. *City of Chicago v. Altgeld*, 23

3. A court is not bound to grant a continuance on the certificate of a physician. *Waarich v. Winter*, 36

4. The improper introduction of counter affidavits on a motion for a continuance will not amount to reversible error, where those in support thereof are insufficient. *Id.*, 36

5. Affidavits in support of such motion must not only show that illness prevented presence at trial but also the existence of a defense. Merits must always be shown upon such an application. *Id.*, 36

6. A cause can not be reinstated after the term during which it was dismissed has passed, unless under such circumstances as, on a bill filed for that purpose, would, upon rules established, warrant a bill to set aside an ordinary decree after it has become final. *Merritt v. Merritt*, 63

7. Upon an appeal from an order dissolving an injunction, dismissing a bill for want of equity and awarding a writ of restitution for premises taken possession of under cover of the injunction, the trial court finding that the same was improperly obtained for that purpose, this court enters a new decree, in lieu of, and as a substitute for the decree of the trial court, by modifying the same in so far as to dismiss the bill and cross-bill in the case without prejudice to the rights and remedies at law of either and both of the parties to the suit. *Taylor v. L. S. & M. S. Ry. Co.*, 116

8. In the absence from the record of a rule of court warranting such action, an appeal should not be dismissed on a preliminary call. *Bessey v. Ruhland*, 73

PRACTICE. *Continued.*

9. This court holds the clause in Sec. 68, act of 1872, requiring a written appearance ten days before the term by the appellee, to apply only to appeals taken by filing a bond with the clerk, and not to apply to appeals taken by filing a bond with the justice. *Id.*, 73
10. When a judgment by confession is entered in vacation before the clerk, the warrant of attorney becomes a part of the record by being filed, and no bill of exceptions is necessary. *Schmidt v. Bauer*, 92
11. When the judgment is entered in term time, it becomes a part of the record only by being made so by such bill. *Id.*, 92
12. When the absence of a bill of exceptions precludes this court from knowing what evidence was introduced in a given case, it will presume that it warranted the judgment which is shown by the record to be valid on its face. *Id.*, 92
13. An attorney in a cause should not, upon trial, request a juror to note down the items of his client's claim. *Ettelsohn v. Kirkwood*, 103
14. The Circuit Court can not grant a motion to set aside a default at a term subsequent to the one at which it was entered for any error of law apparent on the record. *Schmidt v. Thomas*, 109
15. The allegation as a ground for such motion, that through "accident and mistake" the party making the same was prevented from presenting a meritorious defense, has no weight. *Id.*, 109
16. A declaration must state with certainty who are the parties to a given suit, and the same must be commenced and prosecuted in the proper Christian and surnames thereof. *Id.*, 109
17. Failure in this regard is cured by personal service, but not in the absence of appearance, where service is by publication. *Id.*, 109
18. Where a defendant personally served, fails to appear, a judgment by default is erroneous, when the name of the party in the process is such that the law does not recognize it as the name of an individual or corporation. *Id.*, 109
19. Where a case has been fully tried, errors which did no injury may be disregarded, if it appears that justice has been done. *Id.*, 109
20. The credibility of the witnesses in a given case is for the jury. *Chicago Hansom Cab Co. v. Harellick*, 151
21. The general verdict in a given case will control, where the special finding therein can not upon any hypothesis be reconciled therewith. *Smith v. McCarthy*, 176
22. Interference by the trial court with the right of the jury to pass upon the question of negligence, is justifiable only when the verdict is against the weight of the evidence. *Id.*, 176
23. The meaning of correspondence is a question for the court, unless it appears that the words used are to be considered in other than the ordinary sense. *Hammond v. Cragin Mfg. Co.*, 216
24. The finding of the trial court upon evidence heard orally should have as much weight as the verdict of a jury. *Conrad v. Kloepper*, 228
25. In such case the fact that the evidence was conflicting will not warrant this court in awarding a new trial. *Id.*, 228

PRACTICE. *Continued.*

26. A bill of exceptions should clearly show the facts in a given case and the exceptions taken, and if defective through ambiguity, uncertainty or omission, must be construed most strongly against the party who prepared it. *Monroe v. Snow*, 230

27. A decree adopting a master's report amounts to the overruling of exceptions thereto. *Portous v. Holmes*, 312

28. This court condemns the use by counsel in jury trials of extravagant and intemperate language, calculated to arouse the prejudice and passion of jurors and lead to unjust results. *L. S. & M. S. Ry. Co. v. May*, 360

29. The construction of a written agreement is for the court. *Mead v. Altgeld*, 373

30. The addition by the trial court to the verdict in a given case assessing the damages at a sum named "with interest," of words naming the amount thereof including interest, can not be complained of. *Clapp v. Martin*, 438

31. A defendant who states the substance of a municipal ordinance in his opening and admits the breach thereof, can not complain of the reading of the same after the evidence is all in, in behalf of the plaintiff, as a part of his argument to the jury. *L. S. & M. S. Ry. Co. v. Bodemer*, 479

32. It is proper to refuse to allow a party to examine at length, as his own witness, a person whom his adversary has called and examined as to the same matter, and whom the first party had an opportunity to cross-examine as to every circumstance. Additions to and explanations or qualifications of the testimony in chief, when part of the same transaction, should be brought out by cross-examination. *Alexander v. Manderille*, 589

33. Whether a declaration states a case upon which a recovery can be had, is always an original question in a court of review, without regard to demurrers and motions in arrest below, if presented by the assignment of errors. *Beadle Co. Nat. Bank v. Hyman*, 618

34. A court trying a cause without a jury, should act upon principles which it would direct a jury to follow in a similar case. *Id.*, 618

35. In view of the filing of briefs by the appellee wherein are discussed the merits of a given cause, a motion filed by him on the same day asking that the appeal be dismissed because the appeal bond was not presented for approval until after the time fixed therefor in the order allowing the same, must be considered waived. *Winona Paper Co. v. First Nat. Bank*, 630

36. This court holds as proper the order of the trial court, overruling a motion to set aside a judgment entered by confession in favor of the plaintiff and against the defendant, the case, as based upon the affidavits of both parties, being free from doubt, and no attempt having been made by the defendant to deny or controvert the statements set forth in that of the plaintiff. *Sundberg v. Temple*, 633

37. The court declines to consider the case presented, for the reason that the appellant failed to file an abstract of the evidence. *Magner v. Trumbull*, 646

PRACTICE. *Continued.*

38. Upon an appeal from an order setting aside the satisfaction of a judgment assigned to another, a previous assignment thereof having been made, this court holds that the various questions involved can not be settled upon such appeal, and that resort must be had to proceedings better calculated to attain the end in view. *Barrett v. Lingle*, 650

PRINCIPAL AND SURETY—See MORTGAGES, 7.

PUBLICATION—See CONSTITUTION, 1.

RAILROADS—See MUNICIPAL CORPORATIONS, 6, 7, 8, 9; PERSONAL INJURIES, 5; PRACTICE, 1; TRESPASS, 1.

1. Total inattention to a passenger getting on in the dark, and starting a train while, with ordinary care, he is attempting to get on, when the circumstances are such as constitute an invitation to the passenger to make the attempt, render the company responsible for the consequences. *C. & N. W. Ry. Co. v. I rake*, 114

2. In an action against a railroad company to recover damages for injuries alleged to have been caused through the negligent starting of one of its trains, this court declines to interfere with the verdict for the plaintiff. *Id.*, 114

3. No direct statement that a railroad flagman knew of a fact which it was his duty to know, and by which fact his conduct, as he narrates it, was prompted, is necessary to justify a finding that he did know it. *C. R. I. & P. Ry. Co. v. Clough*, 129

4. In an action against a railroad company to recover damages for injuries received at a street crossing, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Id.*, 129

5. A law or ordinance touching the speed of passenger trains does not apply to an engine and tender. *L. S. & M. S. Ry. Co. v. Probeck*, 145

6. An instruction which does not confine the right of recovery for a personal injury to the ground alleged in the declaration, is bad. *Id.*, 145

7. In an action for the recovery of damages for the death of a railroad employe through the alleged negligence of the company, this court holds, upon the allegation that the declaration is insufficient in not alleging knowledge by the defendant, and want of knowledge by the deceased of the defects named, as to the first objection, that the faults, if any, touching the language of the declarations, were faults in construction, and that no such averment was necessary; and as to the second objection, that the want of an averment of such lack of knowledge can not be complained of. *C. & E. I. R. R. Co. v. Hines*, 271

8. In the case presented, this court declines to interfere with a verdict for \$5,000, in behalf of the plaintiff. *Id.*, 271

9. In an action against a railroad company for the recovery, for the use of third persons, of certain rebates claimed to be due upon freight shipped, an order directed to such company by the shippers having requested such payments to be made to them, this court holds that said

RAILROADS. *Continued.*

order referred only to sums already due or to become due on freight shipped at the date thereof; that payments by the company to a subsequent assignee was a good defense against its makers, and that as to the beneficiaries named, the same would be good so far only as in equity they were the owners of the claim sued upon. *C. & N. W. Ry. Co. v. Becker*, 290

10. A red lantern hung to the corner of an engine tender is no compliance with an ordinance requiring "a brilliant and conspicuous light." *C. & N. W. Ry. Co. v. Trages*, 307

11. In an action for the recovery of damages from a railroad company for personal injuries alleged to have been suffered through its negligence, this court declines to interfere with the verdict for the plaintiff. *Id.*, 307

12. A railroad company is estopped, in an action against it, to recover for personal injuries alleged to have been occasioned through its negligence, to set up as a defense that its rule as to speed was disobeyed by deceased, in the face of evidence going to show that the rate of speed in question was required by the company. *L. S. & M. S. Ry. Co. v. Parker*, 405

13. In an action to recover from a railroad company for the death of a locomotive engineer in the employ of another company alleged to have been occasioned through the negligence of the servants of the former company in leaving a switch open, this court declines, in view of the evidence, to interfere with the verdict for the plaintiff. *Id.*, 405

14. In an action brought by a parent against a railroad company to recover for the death of a minor daughter alleged to have been killed through its negligence, this court holds, in view of the evidence, that the amount of the verdict in his behalf was unwarranted and excessive. *C. E. & L. S. Ry. Co. v. Adamick*, 412

15. In cases of this character, instructions touching the assessment of damages should set forth the proper rule to be followed by the jury in arriving at the same. *Id.*, 412

16. In an action to recover from a railroad company the value of certain meal placed by it in a warehouse, subsequently consumed by fire, this court declines, in view of the evidence, to interfere with the judgment for the defendant. *Woodward v. I. C. R. R. Co.*, 433

17. Wilful or wanton injury to a trespasser is actionable, and it cuts no figure if in such case the person injured was guilty of contributory negligence. *L. S. & M. S. Ry. Co. v. Bodemer*, 479

18. In an action brought by an administrator to recover from a railroad company for the death of his intestate, the same being alleged to have been caused through its negligence, this court holds that the train in question was moving at a reckless rate of speed when the accident occurred; that defendant was guilty of wanton negligence in this regard, and declines to interfere with the verdict for the plaintiff. *Id.*, 479

19. A railroad company may not, because of the exigencies of its business, inflict avoidable loss upon the owners of adjacent property.

RAILROADS. *Continued.*

Such company must use every possible precaution by adopting all the best and most approved mechanical inventions to prevent loss by fire along the line of its road. *Forest Glen Brick & Tile Co. v. C., M. & St. P. Ry. Co.*, 565

20. An instruction, which leaves it to the jury to find that a railroad company performed its duty by using means to prevent the escape of sparks not so good as the best and most approved, is erroneous. *Id.*, 565

REAL PROPERTY—See ADMINISTRATION, 1, 3; AGENCY, 2, 3, 10; BROKERS, 1; INJUNCTIONS, 5; PARTIES, 2; TRESPASS.

1. A purchaser of real estate should receive a title good beyond a reasonable doubt. *Mead v. Altgeld*, 373

2. The sufficiency of a title is a question of law for the court, and in controversies involving the same, the opinions of lawyers and experts should not be considered. *Id.*, 373

3. A purchaser of real estate is entitled to a merchantable title. *Parmly v. Head*, 194

4. Whether or not a title is defective, is a question of law for the court. *Id.*, 194

5. Upon a bill filed to remove the lien of a judgment obtained against the husband of petitioner as being a cloud upon her title to certain real estate, this court holds that the petitioner was not in possession of the premises in question at the time said judgment was obtained under an unrecorded deed, the same having been filed for record after such lien attached, but that she would be entitled, upon sale thereof under execution, or upon her own petition, to receive certain sums paid by her to liquidate mortgages thereon, and that her claim therefor should properly take precedence of liens accruing subsequently to such payments. *Myers v. Maher*, 284

6. In an action to recover a deposit under a contract for the sale of real estate upon the ground that the merchantable title contracted for had not been offered, this court declines, in view of the evidence, to interfere with the judgment in behalf of the plaintiff. *Williams v. Daly*, 454

7. A would-be purchaser is not obliged to extend the time in which to furnish such abstract, but is entitled to rescind upon the expiration of the time agreed upon, and have his deposit paid over. *Id.*, 454

8. Whether a title to real estate is good or not, is a question of law, and an attorney who is a witness is not to state what his opinion is on such question, but must give the facts as to the title if he knows them, only, and it is for the court to state to the jury whether the title is good if the facts are found as claimed. *Leahy v. Hair*, 461

9. To recover commissions on the sale of a piece of real estate, the burden of proof is upon the agent to show that the purchaser furnished by him was ready, willing and able to complete the purchase on the terms proposed. *Id.*, 461

10. Only the owner of land can ask to have a cloud removed from the title thereof. *Johnson v. McChesney*, 526

REAL PROPERTY. *Continued.*

11. Costs and expenses incurred by an owner in such a proceeding can not ordinarily be recovered from his grantor on any of the covenants usually found in warranty deeds. *Id.*, 526

12. The general rule that a bill to remove a cloud can only be maintained when the complainant is in possession, or the land is unimproved and unoccupied, is subject to the exception that, when there is no adequate remedy at law, equity gives relief. *Id.*, 526

13. The term, "abstract of title," means a statement in substance of what appears on the public records affecting the title to the property in question. *Union Safe Deposit Co. v. Chisholm*, 647

14. A waiver as to one objection to a title does not absolve the seller from endeavoring to remove another objection, such removal being made one of the conditions of carrying out the sale. *Id.*, 647

RECEIVERS—See GARNISHMENT, 8, 9; INSOLVENCY, 1.

1. A receiver is clothed with such rights of action as might have been maintained by the person over whose estate he has been appointed, and to whose rights for purposes of litigation he has succeeded. *Burch v. West*, 359

2. Upon a bill filed by the receiver of an insolvent corporation attacking certain judgments confessed by it previous to his appointment, this court declines to interfere with a decree in behalf of the judgment creditors. *Id.*, 359

REMITTITURS—See ATTACHMENT, 3.**REPLEVIN.**

1. A firm maintaining replevin for the recovery of property purchased from their lessee through false representations of one of its members that the said lessee was its owner, the rest of the firm being in ignorance thereof, is liable for the actual damages arising therefrom. *Wanner v. Winters*, 149

2. Solicitor's fees are within the condition in a replevin bond providing for the payment of all costs and damages, occasioned by wrongfully suing out the writ. *Siegel v. Hanchett*, 634

SALES—See EVIDENCE, 11; GUARANTY; INSTRUCTIONS; 6.

1. In an action brought to recover advances, freight charges, etc., alleged to be due upon a shipment of butterine, the contention being as to whether the goods were sold or consigned, this court declines, in view of the evidence, to interfere with verdict for plaintiffs. *Moran v. Gordon*, 46

2. In an action for the recovery of damages alleged to have been suffered through failure to deliver a quantity of bacon according to the terms of a certain writing, this court holds that the same amounted to a contract; that the action was brought in apt time, and was properly brought; that the defendant's authorization to the plaintiff to purchase the quantity named of similar merchandise and charge him with the loss, did not, in any way, vary the terms of the contract, and that the adoption by the trial court of the Bremen instead of the Chicago market values by which to ascertain the damages, was proper in view of the

SALES. Continued.

acting by the plaintiff upon the written authorization of the defendant to so adjust matters. *Memory v. Niepert*, 131

3. In an action to recover an amount claimed to have been paid, over and above what was due upon a certain purchase of goods, the plaintiff alleging that, being unable to read or write, he had trusted a third person to figure for him, this court holds that his testimony alone did not warrant the judgment in his behalf. *Bernstein v. Patterson*, 152

4. In a suit upon a contract of sale of a play for breach of conditions thereof, it being provided that the agreement of sale should become null and void in case the same was not produced, and that it should be returned, this court holds that for the failure to so return, a recovery can be had of its reasonable value. *Bryton v. Marston*, 211

5. In a suit brought to recover from third persons the contract price of a lot of stone sold to another, this court declines in view of the evidence to interfere with a judgment in behalf of the defendants. *Hahn v. Maxwell*, 261

6. In an action brought to recover a sum claimed to be due for certain stone furnished, it being alleged that the same was not included in a certain contract, this court holds that the burden of proof was upon the plaintiff to establish his claim, and that the trial court erred in instructing the jury; that the same was upon the defendants to show that the stone in question was furnished under the contract. *C. & W. I. R. R. Co. v. Thomlinson*, 388

7. In an action to recover the value of certain furnaces, this court holds that in view of the issues in the case, the verdict for the plaintiff for one cent was not sufficiently inconsistent to be reversed. *Hess v. Board of Education*, 440

8. In an action to recover the price of a lot of cigars this court, in view of the evidence, declines to interfere with a judgment for the plaintiffs. *Huston v. Boltz*, 449

SET-OFF—See **LANDLORD AND TENANT**, 1.

SETTLEMENT.

1. This court will not disturb a voluntary settlement of conflicting claims, though based upon an erroneous interpretation of the law. *Gilek v. Stock*, 147

2. When two parties by compromise liquidate and state at an agreed sum an unliquidated and disputed claim which the one holds against the other, it amounts to a valid contract whether the amount stated be paid or not, and the only remedy is upon the contract to recover the amount thus liquidated. *Wolf Co. v. Salem*, 614

SPECIAL VERDICT.

1. A special verdict is a special finding of facts inconsistent with the general verdict that is to control it, and no question, the answer to which can not have that effect, can be material. *C. & N. W. Ry. Co. v. Bouck*, 123

SPECIAL VERDICT. *Continued.*

2. This court condemns the practice of requiring juries to find specially upon an unreasonable number of interrogatories. *Id.*, 123

TAXES—See INJUNCTIONS, 5.

1. Upon a bill filed to enjoin the taking out of a tax deed of certain real estate and to remove certain documents spread upon the records, as a cloud upon the title thereof, this court holds that Sec. 211 of the Revenue Statute applies only to cases where the land is a second time sold for the taxes of a succeeding year. *Eggleston v. Gage*, 184

2. In an action brought to recover in full an amount paid under an illegal levy of taxes for the purpose of establishing a road, the fact being that subsequent to the declaration of illegality by the Supreme Court a resolution was adopted at a regular town meeting to refund said levy less a percentage for expenses, this court holds that the plaintiff is entitled to the refunding of the same only under said resolution and in conformity with the terms thereof. *Lang v. Saffell*, 624

TELEGRAPH COMPANIES.

1. In the absence of evidence tending to show that an error in a telegram did not occur through natural causes, the presumption will be that the same arose from the negligence of the company. *Postal Telegraph Cable Co. v. Lathrop*, 400

2. If a message delivered is in cipher, an unintelligible jumble of words having no meaning in themselves, a company is not responsible for the damages resulting from an error in its transmission, however clear the meaning might be to one having the key. *Id.*, 400

3. If a message on its face appears to relate to a business transaction, involving the purchase and sale of property, the company has notice thereby that it is important, and is liable for the actual damages resulting from an error in its transmission, through its negligence. *Id.*, 400

4. In an action brought to recover from a telegraph company for damages alleged to have arisen through errors in the transmission of certain dispatches, this court, in view of the evidence, declines to interfere with the verdict for the plaintiff. *Id.*, 400

TRESPASS.

1. In an action of trespass *quare clausum* against a railroad company, it being alleged that certain premises were wrongfully taken possession and made use of by it, this court holds that the defendant fully justified the entry under the plea of *liberum tenementum* which, by a certain stipulation entered into, was to be considered as pleaded in the case; that whatever rights the plaintiff might have in equity to redeem, in no way affected the legal title conveyed by a certain deed, when the matter came in question in an action at law, and that the judgment for the plaintiff for the rental value of the premises from the date of the entry until the commencement of the suit, was erroneous, in view of the fact that he did not re-enter the same. *C. & W. I. R. R. Co. v. Slee*, 416

2. In order to entitle the plaintiff in an action of trespass to recover

TRESPASS. *Continued.*

for a continuance in possession after an ouster, there must be an entry on his part. *C. & W. I. R. R. Co. v. Slee*, 420

3. The possession of property levied upon, in the hands of a custodian, is the possession of the officer so placing it, and he can maintain trespass against one who removes the same. *Hanchett v. Ives*, 471

TROVER—See MORTGAGES, 14.

1. To maintain trover the plaintiff must, at the time of the conversion, have, as against the defendant, a right of property in the chattel converted, and the actual possession or right to possession thereof. *Blain v. Foster*, 297

2. In an action of trover, the plaintiff must have, at the time of the conversion, as against the defendant, a right of property in the chattel converted and the possession thereof, and must prove that while the right of possession was in him, he made a demand therefor. *Poppers v. Peterson*, 384

3. In an action to recover the value of certain furniture and jewelry, this court holds, in view of the evidence, that the judgment in behalf of the plaintiff can not stand. *Id.*, 384

4. The measure of damages in an action of trover for the conversion of a paper of no intrinsic value in itself, but evidence of title to a valuable right, interest or property, is the value of the right of which it is evidence of title with interest from the date of the conversion to time of trial. *Olds v. Open Board of Trade*, 445

5. The cancellation of a certificate of membership amounts to a conversion thereof. *Id.*, 445

TRUST DEEDS—See MORTGAGES.

TRUSTS—See ADMINISTRATION, 3.

1. A trustee appointed under an order containing no provision for payment can not recover compensation for his services. *Cook v. Gillmore*, 532

USURY—See NEGOTIABLE INSTRUMENTS, 8.

WAREHOUSEMEN—See BROKERS, 3.

WARRANTY—See AGENCY, 7.

1. A warranty of title contained in a bill of sale of fixtures constituting a part of the freehold, can not be avoided by the declaration of the vendor to the vendee before the execution thereof, that he does not own them. *Koerper v. Jung*, 144

2. In an action for a breach of such a warranty, a recovery may be had for the value of the property in question to a tenant occupying the premises wherein they are located. *Id.*, 144

WITNESSES—See COSTS, 3, 4; FEES, 2; PRACTICE, 32.

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